TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913

No. 820.

FRED ROBERTSON AND W. J. RATCLIFF, PLAINTIFFS IN ERROR,

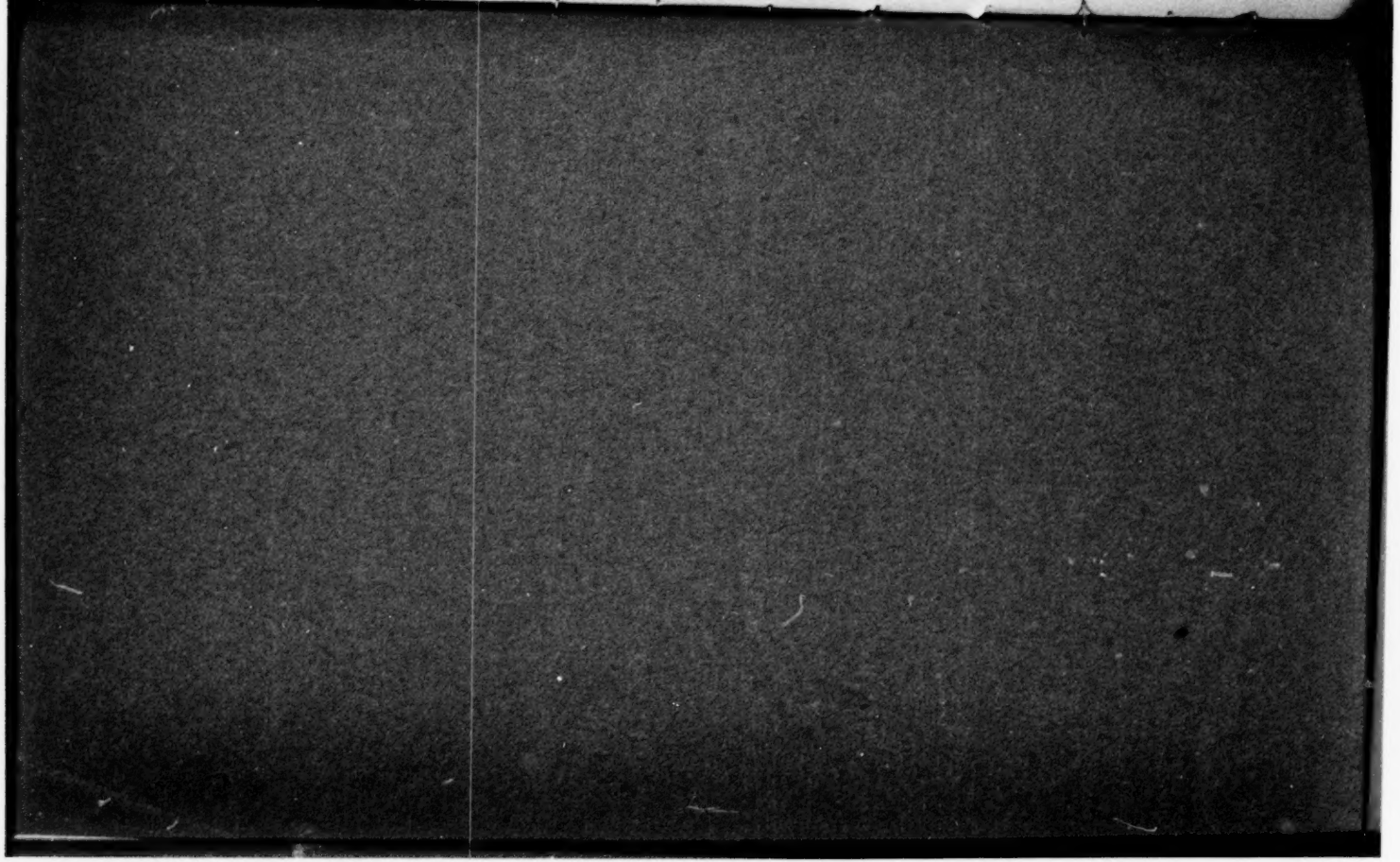
vs.

C. F. HOWARD AND FRED HOWARD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JUNE 6, 1913.

(22,777)



(22,727)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 320.

FRED ROBERTSON AND W. J. RATCLIFF, PLAINTIFFS IN ERROR,

vs.

C. F. HOWARD AND FRED HOWARD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 8, 1912.

a In the Supreme Court of the State of Kansas.

FRED ROBERTSON et al., Appellees,
vs.
C. F. HOWARD, Appellant.

FRED ROBERTSON et al., Appellees,
vs.
FRED HOWARD, Appellant.

Be it remembered, that on the 3rd day of May A. D. 1909, there was filed in the office of the clerk of the supreme court of the State of Kansas, petitions in error and transcripts of the record in the above entitled cases which petitions in error and an abstract of the transcript of the record upon which the case was considered by this court, is in the words and figures as follows, to-wit:—

b In the Supreme Court of the State of Kansas.

No. 16462.

Filed May 3, 1909. D. A. Valentine, Clerk Supreme Court.

C. F. HOWARD, Plaintiff in Error,
vs.
FRED ROBERTSON and W. J. RATCLIFF, Defendants in Error.

Petition in Error.

The Plaintiff in Error, C. F. Howard complains of the said Fred Robertson and W. J. Ratcliff Defendants in Error, for that heretofore to-wit: on the 12th day of November 1908, at the November term of said District Court, of Rawlins county, in the State of Kansas, the said Fred Robertson and W. J. Ratcliff, Defendants in Error, recovered a judgment for the possession of the southeast quarter of section sixteen, in township one, south, range thirty four, west of the 6th P. M. in Rawlins county, Kansas, and also judgment one hundred and fifty dollars, as rents and profits for the use of said land, against the plaintiff in error in a certain action then pending in said District Court, wherein the said Fred Robertson and W. J. Ratcliff were the plaintiffs, and the said C. F. Howard was the defendant. That the original Case Made in said action, containing a full transcript of the record, judgment, orders, evidence and all proceedings, in said action, and so much of the proceedings, evidence and other matters in said action as are necessary to present the errors complained of herein to this court, duly certified, signed filed and attested, marked exhibit "A" and made a part of this petition in error.

This Plaintiff in Error Avers: That there is error in the said record and proceedings in this to-wit:

1st. That the court erred in overruling the objections of this plaintiff in error to questions asked by the said defendants in error on the trial of said action.

c 2nd. The court erred in admitting evidence objected to by the plaintiff in error, on said trial.

3d. The court erred in refusing to strike out of the record certain evidence and testimony on the trial of said action on the application therefore of the said plaintiff in error.

4th. The court erred in refusing to allow the plaintiff in error to ask certain questions on said trial.

5th. The court erred in refusing to permit the plaintiff in error to introduce certain evidence and testimony offered by said plaintiff in error on said trial, which was excepted to at the time.

6th. The court erred in overruling the demurrer to the evidence of said defendants in error.

7th. The court erred in his special findings of fact.

8th. The court erred in his conclusions of law, made by him in said action.

9th. The findings of fact are contrary to the evidence.

10th. The findings of fact are not supported by sufficient evidence.

12th. The judgment was given for the defendant in error when it should have been given for the plaintiff in error, according to the law of the land.

13th. The court erred in overruling the motion of the plaintiff in error for judgment on the special findings of fact and conclusions of law.

14th. The court erred in overruling the motion of the plaintiff in error for a new trial.

d 15th. For other errors occurring at the trial of the action, but not specifically mentioned herein, and objected to and excepted to by the plaintiff in error.

16th. The judgment is not supported by sufficient evidence.

This plaintiff in error therefore prays that said judgment may be reversed, set aside and held for naught, and this plaintiff in error be restored to all things he has lost thereby, and that said District Court, be ordered to render judgment for this plaintiff in error on the special findings of fact and conclusions of law, besides judgment for costs of this action.

J. P. NOBLE AND
L. H. WILDER,
Attorney- for Plaintiff in Error.

The clerk of the Supreme Court, will please issue summons in error for the within named defendants in error, direct to the Sheriff of Rawlins county, Kansas.

J. P. NOBLE AND
L. H. WILDER,
Attorney- for Plaintiff in Error.

Filed May 3, 1909. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 16463.

Filed May 3, 1909. D. A. Valentine, Clerk Supreme Court.

FRED HOWARD, Plaintiff in Error,
vs.
FRED ROBERTSON and W. J. RATCLIFF, Defendants in Error.

Petition in Error.

The Plaintiff in Error, Fred Howard complains of the said Fred Robertson and W. J. Ratcliff Defendants in Error, for that heretofore to-wit; on the 12th day of November 1908, at the November term of said District Court, of Rawlins County, Kansas, the said Fred Robertson and W. J. Ratcliff, Defendants in Error, recovered a judgment for the possession of the southwest quarter of section sixteen, in township one, south, range thirty four, west of the 6th P. M. in Rawlins County, Kansas, and also judgment for One hundred and fifty dollars, as rents and profits for the use of said land, against the plaintiff in error in a certain action then pending in said District Court, wherein the said Fred Robertson and W. J. Ratcliff were the plaintiffs, and the said Fred Howard was the defendant. That the original case made in said action, containing a full transcript of the record, judgment, orders, evidence and all proceedings in said action, and so much of the proceedings, evidence and other matters in said action as are necessary to present the errors complained of herein to this court, duly signed, certified, filed and attached, marked exhibit "A" and made a part of this petition in error.

This Plaintiff in Error Avers:—That there is error in the said record and proceedings in this to-wit:

1st. The court erred in overruling the objections of this plaintiff in error to questions asked by the said defendants in error on the trial of said action.

2nd. The court erred in admitting evidence objected to by the plaintiff in error, on said trial.

3d. The court erred in refusing to strike out of the record certain evidence and testimony on the trial of said action on application therefor by said plaintiff in error.

4th. The court erred in refusing to allow the plaintiff in error to ask certain questions on said trial.

5th. The court erred in refusing to permit the plaintiff in error to introduce certain evidence and testimony offered by said plaintiff in error on the trial, which was excepted to at the time.

6th. The court erred in overruling the demurrer to the evidence of said defendants in error.

7th. The court erred in his special findings of fact, and they were not supported by sufficient evidence.

8th. The court erred in his conclusions of law, made by him in said action.

9th. Said findings of fact are contrary to the evidence.

10th. The conclusions of law are contrary to the law.

11th. The judgment rendered in said action is not supported by sufficient evidence.

12th. The conclusions of law, are contrary to the law.

13th. The judgment was given for the defendant in error when it should have been given for the plaintiff in error, according to the law of the land.

14th. The court erred in overruling the motion of the plaintiff in error for judgment on the special findings of fact and conclusions of law.

15th. The court erred in overruling the motion of the plaintiff in error for a new trial.

16th. For other errors occurring at the trial of the action, but not specifically mentioned herein, and objected to and excepted to by the plaintiff in error.

This plaintiff in error therefore prays that said judgment may be reversed, set aside and held for naught and void, and this plaintiff in error be restored to all things he has lost thereby, and that said District Court, be ordered to render judgment for this plaintiff in error on the special findings of fact and conclusions of law, besides judgment for costs of this action.

J. P. NOBLE AND
L. H. WILDER,
Attorneys for the Plaintiff in Error.

Filed May 3, 1909. D. A. Valentine, Clerk Supreme Court.

g The Clerk of the Supreme Court, will please issue summons in error for the within named defendants in error, direct to the Sheriff of Rawlins county, Kansas.

J. P. NOBLE,
L. H. WILDER,
Attorneys for the Plaintiff in Error.

h 16462-3.

In the Supreme Court, State of Kansas.

No. 16462.

C. F. HOWARD, Appellant,
vs.
FRED ROBERTSON and W. J. RATCLIFF, Appellees.

No. 16463.

FRED HOWARD, Appellant,
vs.
FRED ROBERTSON and W. J. RATCLIFF, Appellees.

Abstract of Record by Appellants.

J. P. Noble, L. H. Wilder, T. F. Garver, R. D. Garver, Attorneys for Appellants.

1 In the Supreme Court, State of Kansas.

No. 16462.

C. F. HOWARD, Appellant,
vs.
FRED ROBERTSON and W. J. RATCLIFF, Appellees.

No. 16463.

FRED HOWARD, Appellant,
vs.
FRED ROBERTSON and W. J. RATCLIFF, Appellees.

Abstract of Record by Appellants.

These two cases are both actions in ejectment involving the same facts, and were tried on the same evidence by the court, the same findings made, and the same judgments entered in favor of appellees, who were plaintiffs below. Hence they are abstracted together.

2 On July 12, 1907, Fred Robertson and W. J. Ratcliff filed their petitions in ejectment, in the district court of Rawlins county, Kansas, against C. F. Howard for the recovery of the possession of the southeast quarter of section 16, township 1, range 34, in said county, and against Fred Howard for the recovery of the possession of the southwest quarter of the same section, being Case Nos. 16462 and 16463 in this court. The petitions were in usual form, alleging that the plaintiffs were the owners of the legal and equitable title to, and entitled to the immediate possession of, said lands and that the defendants, respectively, unlawfully kept them out of possession thereof. The petitions contained a second cause of action for rents and profits, for the three preceding years.

Answers were filed to said petition consisting of a general denial.

Trial by the court was had at the March 1908 term of court; case taken under advisement and decision rendered, special findings of fact being made, November 12, 1908, in favor of the plaintiffs.

The record shows that the land in question was state school land, which, on the 23rd day of December, 1884, was sold in compliance with the provisions and requirements of law by the county clerk of Rawlins County, Kansas, to A. B. Thomas; that Thomas paid down one-tenth of the purchase money and received from the

3 county clerk a certificate of purchase, reciting the amount for which said land had been sold and that if interest payments were made thereon annually thereafter and the balance of the principal paid in twenty years from said date, said Thomas, or his assigns, would be entitled to a patent for said land from the state of Kansas; that thereafter, by several assignments of said certificate and of the assignor's interest in said land, the same was assigned and transferred by an instrument in writing dated October 28, 1901, to John H. Hagener. The following was the form of the several writ-

ten assignments: "We hereby assign the within certificate together with all our right, title and interest in and to the real estate therein described, to," the assignee named.

The annual interest payments were made from time to time on said certificates, the last payment being made by John H. Hagener on the 2nd day of November, 1901.

The record further shows that John H. Hagener filed a voluntary petition in bankruptcy in the district court of the United States for the Southern district of Illinois, on or about October 7, 1902, and on such petition was, on November 4, 1902, duly adjudged a
4 bankrupt. His schedule of property contained among others, the following:

Location and Description of Real Estate Owned by Debtor or Held by Him.

"Certificate of purchase of school land S. W. ¼ sec. 16 T. 1 R. 31 Rawlins County, Kansas,

Certificate of purchase of school lands S. E. ¼ sec. 16 T. 1 R. 31 Rawlins Co., Kansas."

One R. R. Hewitt was duly appointed trustee of the estate of said John H. Hagener, bankrupt. On May 31, 1904, the trustee presented to the bankrupt court a petition for an order to sell property, which, after the caption, was as follows:

"Respectfully represents R. R. Hewitt, trustee of the estate of said bankrupts that it would be for the benefit of said estate, that all the real estate of said bankrupts to-wit: Lots Three (3) and Four (4) in Block One Hundred and Twenty-two (122) in the addition of the School Commissioners of Morgan County, Illinois, to the town (now city) of Beardstown, Cass County, Illinois, and certificates of purchase of school lands, situated in Rawlins County, State of Kansas, to-wit: The southwest quarter and the southeast quarter and the northwest quarter, all in section sixteen (16) township one (1), Range thirty-four (34), should be sold by auction for cash in hand, estimated value of said lots Thirty Dollars each.

"Petitioner further represents that there are a large number of promissory notes and accounts belonging to said estate of but little, if any value. Wherefore he prays that he may be authorized to make sale of said lots and all interest in said lands by auction, and at the same time and place after having given due notice of
5 such sale, that he also be authorized to sell at auction for cash said promissory notes and book accounts, and that he may sell said real and personal property, separately or in bulk.

R. R. HEWITT, *Trustee.*"

Dated May 31, 1904.

On September 24, 1904, the referee in bankruptcy, to whom said petition was referred, made the following order:

"R. R. Hewitt, duly appointed trustee of the estate of above named bankrupts, having filed his petition representing that it would be for the best interests of said estate that the interest of said bankrupts in the following real estate be sold at public auction, to-wit: Lots Three (3) and Four (4), in Block One Hundred Twenty-two (122), in the addition of the School Commissioners of Morgan County, Illinois, to the town (now city) of Beardstown, Cass County, Illinois, and certificates of purchase of school lands situated in Rawlins County, Kansas, described as follows: The southwest quarter (¼) and the southeast quarter (¼) and the northwest quarter (¼), all in section sixteen (16), township one (1), range thirty-four (34) and also all uncollected notes and accounts due said bankrupts.

"And the said petition having come on for a hearing, ten days' (10) *days* notice thereof having been given to creditors by mail, no adverse interest being represented thereat, and the court being advised in the premises and deeming it to the best interests of said estate that said real estate and notes and accounts be sold;

"Be, and it is, hereby ordered that said trustee sell all right, title and interest of said bankrupts in and to said real estate by
6 public auction to the highest and best bidder for cash in the City of Beardstown, Illinois, after first advertising said sale in at least one (1) newspaper of general circulation published in Cass County, Illinois, once each week for three successive weeks, and by handbills generally distributed in said county of Cass and State of Illinois not less than ten (10) days prior to said sale, and advertisements containing a brief description of the property to be sold time, place and manner of sale.

Order entered this 24th day of September, A. D. 1904.

E. S. ROBINSON,
Referee in Bankruptcy."

Pursuant to said order the trustee duly published the following notice of sale:

"Public Sale of Bankrupt Property of W. C. Hagener and J. H. Hagener as Hagener Bros., Bankrupts.

By virtue of an order of the Referee in Bankruptcy of the U. S. District Court, Southern Division of Illinois, I will on the 12th day of November, 1904, at the hour of one o'clock p. m., at the front door of the First State Bank, in the City of Beardstown, Illinois, sell at public vendue to the highest and best bidder for cash in hand, the following described real estate, to-wit: Lots Three (3) and Four (4) in Block One Hundred and Twenty-two (122), in the addition of the School Commissioners of Morgan County, to the town (now city) of Beardstown, Illinois; also certificates of purchase of the southwest quarter and the northwest quarter and the southeast quarter of section sixteen, township one, range one, in Rawlins County, State of Kansas, also all the promissory notes, and accounts and books of account, in my hands as trustee, and belonging to said bankrupt state.

R. R. HEWITT, *Trustee.*"

7 November 18, 1904, the trustee made to the bankrupt court the following report:

"To the Honorable Judge of said Court: The undersigned Trustee of the estate of the above named bankrupts, would hereby report that by virtue of an order heretofore entered in this court, he did on the twelfth day of November, 1904, at the hour of 1 o'clock p. m. at the front door of the First State Bank, in the City of Beardstown, Illinois, offer for sale at Public Vendue, the following described real estate to-wit: Lots Three (3) and Four (4) in Block One Hundred and Twenty-two (122), in the Town (now city) of Beardstown; and also certificates of purchase of the southwest quarter, and the northwest quarter, and the southeast quarter of section 16, township one (1) range 34 in Rawlins County, State of Kansas. I first offered said certificates; for which I did not receive any bid; I then offered Lot three; and not receiving any bid for said lot, I then offered lots three and four, and said certificates of purchase; and Henry Frauman bid one hundred and fifteen dollars, for said lots three and four and said certificates of purchase; and the said Henry Frauman being the highest bidder the said real estate was struck off to him.

"I further report that previous to making said sale, I caused a notice, of which the annexed is a true copy, to be published for three successive weeks in the Virginia Gazette, a weekly newspaper published in said Cass County, and also posting similar notices of said sale in five of the most public places in the City of Beardstown, where said real estate is situate, (three weeks prior to day of sale). I also sold notes and account to Roy Reynolds and Kuhlane for twenty-five dollars.

All of which is respectfully submitted.

R. R. HEWITT, *Trustee.*"

8 On November 29, 1904, the following order was made by the Referee:

"It appearing to the court that R. R. Hewitt, duly appointed trustee of the estate of the above named bankrupts, did, on the 12th day of November, 1904, at the hour of one o'clock p. m., at the front door of the First State Bank, in the City of Beardstown, Illinois, in pursuance of an order entered herein on the 24th day of September, 1904, sell at public auction all the right, title and interest of the said bankrupts in and to the following described real estate, to-wit: Lots Three (3) and Four (4), in Block One Hundred Twenty-two (122), in the addition of the School Commissioners of Morgan County, Illinois, to the Town (now city) of Beardstown, and also certificates of purchase of the southwest quarter (¼) and the northwest quarter (¼) and the southeast quarter (¼) of Section Sixteen (16), township one (1), range thirty-one (31), in Rawlins County, Kansas, and also all uncollected notes and accounts due said estate.

"And it further appearing to the Court that at said sale one Henry Frauman bid the sum of $115.00 for said Lots Three (3) and Four (4) in Block One Hundred Twenty-two (122), in the addition of School Commissioners of Morgan County, in the town (now

city) of Beardstown, Illinois, and the same being the highest and best bidder therefor, said property was then and there struck off and sold to the said Henry Frauman for the said sum of $115.00. And it further appearing that at said sale trustee failed to receive any bid for certificate of purchase of the southwest quarter (¼) and the northwest quarter (¼) and the southeast quarter (¼) of Section Sixteen (16), Township One (1), Range Thirty-one (31) in Rawlins County, Kansas.

"And it further appearing that at said sale the sum of $25.00 was bid for the said uncollected notes and accounts, and the same being the highest and best bidder therefor the said notes and accounts were then and there struck off and sold for said sum of $25.00.

"And it further appearing that the said trustee in making said sale in all things strictly complied with the order of the court therefor;

"Therefore be, and it is, hereby ordered that said sale be approved and the same is hereby approved, and the trustee is hereby instructed to execute and deliver his deed as trustee of the estate of said bankrupts, to the purchaser of the said real estate on the payment of the purchase price.

"Order entered this 29th day of November, A. D. 1904.

E. S. ROBINSON,
Referee in Bankruptcy."

On April 18, 1906, the trustee R. R. Hewitt made the following report to the said bankrupt court:

"Now comes R. R. Hewitt, Trustee of the estate of said Bankrupt and reports that heretofore on May 31, 1904, he duly filed petition for order to sell the property of said estate including three certificates of purchase of school lands situated in Rawlins County, State of Kansas, one for the southwest quarter, one for the southeast quarter and one for the northwest quarter, of Section 16, Township 1, Range 34, which petition was granted by order of the Referee herein duly made and entered September 24 1904, and on the 12th day of November, 1904, having first duly published a notice in newspaper and by hand bills at the time and in the manner required by said order, petitioner offered all of said property for sale at 1 o'clock P. M., at the front door of the First State Bank in the City of Beardstown, Illinois, in full compliance with the requirements of law having first offered said certificates of purchase of school lands in said Rawlins County, Kansas, and not having received any bids for said certificates separately or together, petitioner offered all of said certificates together with Lots Three (3) and Four (4) in Block One Hundred Twenty-two (122) in the Addition of the School Commissioners of Morgan County, Illinois, in the town (now city) of Beardstown, Cass County, Illinois, and duly sold said lots and certificates to one Henry Fraumann, all for the sum of One Hundred Fifteen ($115.00) Dollars, the same being the highest and best bid therefor and said property was then and

there struck off to the said Henry Frauman for the said sum of One Hundred Fifteen ($115.00) Dollars, said three certificates of purchase being so sold for One ($1.00) Dollar each cash in hand paid as a part of said consideration of One Hundred Fifteen ($115.00) Dollars for said lots and certificates. And on November 30th, 1904 pursuant to said sale petitioner duly assigned and delivered to said Henry Fraumann said three certificates of purchase of school lands and duly executed and acknowledged before John Listmann, a Notary Public, in and for Cass County, State of Illlinois, a separate assignment in writing for each of said certificates and delivered the same with said assignment to said Henry Fraumann, the sum so received for said certificates being the highest and best price offered and obtainable therefor. Wherefore petitioner prays that said sale of said three certificates of purchase of said school lands and this report thereof be approved and confirmed.

R. R. HEWITT, *Trustee.*"

Said report was approved and confirmed by the referee in bankruptcy on April 19, 1906.

11 The record shows that no appraisement was made, either of the certificates or of the land. Nothing of the kind appears in the certified record of the bankruptcy proceedings. The Clerk of the District Court of the United States for the Southern District of Illinois, certifies:

"I, R. C. Brown, Clerk of the District Court of the United States for said Southern District of Illinois, and keeper of the records and seal thereof, do hereby certify the foregoing to be a true copy. * * * and, I further certify that all proceedings in relation to real estate belonging to said firm or individuals (Hagener Bros. and W. C. Hagener and John H. Hagener) *as* completely covered by the foregoing certified copies."

The foregoing bankruptcy proceedings were shown in evidence by the defendants below.

As a part of their case the plaintiffs offered in evidence the following assignments:

"By virtue of an order of the referee in bankruptcy, of the United States District Court for the Southern District of Illinois, in reference to the assets in my hands as trustee of Hagener Bros. Partners, and John H. Hagener and William C. Hagener as individuals, Bankrupts, I did on the twelfth day of November, 1904, offer the within and foregoing certificate at public sale to the highest bidder for cash in hand, and Henry Fraumann of the City of Beardstown in Cass County, Illinois, being the highest bidder, the same was by me struck off and sold to him, and now by virtue of said order and sale and in consideration of One Dollar to me in hand paid,

12 the receipt whereof is hereby acknowledged, I as trustee in said bankrupt proceedings, hereby assign to the said Henry Fraumann the annexed and foregoing certificate, and all the right title and interest of and to the lands therein described by John H.

Hagener or by Hagener Brothers as partners, bankrupts as aforesaid.

Witness my hand and seal this, the 30th day of November, 1904.

R. R. HEWITT, *Trustee.* [SEAL.]

The foregoing assignment was duly acknowledged by said trustee before John Listman, a Notary Public of Cass County, Illinois, on November 30, 1904.

"For and in consideration of Thirty-three and 33-100 ($33.33) Dollars we hereby assign the certificate referred to in the foregoing instrument and hereby annexed together with all our right, title and interest in and to the real estate therein described, to-wit: Southeast quarter section sixteen (16) Township One (1) Range thirty-four (34) Rawlins County, State of Kansas, to Fred Robertson of Rawlins County, State Kansas.

Witness our hands and seals this 19th day of July A. D. 1905.

HENRY FRAUMANN. [SEAL.]
LOUISA FRAUMANN." [SEAL.]

The foregoing assignment was duly acknowledged by said Henry Fraumann and Louisa Fraumann, his wife, before John Listmann, a Notary Public of Cass County, Illinois, on July 19, 1905.

"For and in consideration of the sum of one dollar and other good and valuable considerations in hand paid, the under-
13 signed, Fred Robertson and Luella J. Robertson husband and wife hereby assign the undivided half of the within certificate, together with the undivided half of all their right, title and interest in and to the real estate therein described to W. J. Ratcliff, of Rawlins County in the State of Kansas.

Witness our hands this 5th day of August, 1905.

FRED ROBERTSON.
LUELLA J. ROBERTSON."

The foregoing assignment was duly acknowledged by said Fred Robertson and Luella J. Robertson his wife before Nannie Robertson, a Notary Public of Rawlins County, Kansas, on August 6, 1905.

On July 19, 1905, Henry Fraumann also executed an assignment to Fred Robertson of all his right to the rents and profits of said land that accrued between November 12, 1904 and July 19, 1905, and on August 5, 1905, Fred Robertson executed a similar assignment of the undivided one-half interest in such rents to W. J. Ratcliff.

Like assignments were in evidence as to the southwest quarter.

Plaintiffs also introduced in evidence the following:

14 "In the Supreme Court of the State of Kansas.

No. 14620.

FRED ROBERTSON and W. J. RATCLIFF, Plaintiffs,
vs.
J. W. BUCK, County Treasurer of Rawlins County, Kansas, Defendant.

Peremptory Writ of Mandamus.

The State of Kansas to J. W. Buck, County Treasurer of Rawlins County, State of Kansas, Greeting:

Whereas, It appears that the Supreme Court of Kansas on the 5th day of January, 1907, rendered judgment in favor of plaintiffs and against the defendant herein, and ordered the issuance of a peremptory writ of Mandamus to the defendant; Now, therefore, this is to command you, J. W. Buck, County Treasurer of Rawlins County, Kansas, immediately upon the receipt of this Writ to accept the tender of lawful money of the United States in the sum of $630.00 made by the plaintiffs Fred Robertson and W. J. Ratcliff, said sum of $630.00 being a tender of $170.00 for the benefit of C. F. Howard on account of all payments made by him to the County Treasurer; $432.00 for the purpose of paying the balance of purchase price, and the (sum) of $28.00 for the purpose of paying whatever school land interest has accrued and remains unpaid up to and inclusive of August 15, 1905, and that you issue your receipts and certificates therefor as provided by law upon the following described land:

15 Southeast Quarter (¼) Section Sixteen (16) Township One (1) South, Range Thirty-four (34) West of the 6th P. M. in Rawlins County, Kansas.

That you make due return of this writ on or before Friday, February 15th, 1907, showing in what manner you have complied with the commands herein.

Witness, The Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas and the seal of the Supreme Court affixed hereto at Topeka, in the said state, this 28th day of January, 1907.

[Seal Supreme Court State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court."

Pursuant to said peremptory writ of mandamus the plaintiffs, Robertson and Ratcliff, paid to the county treasurer the balance of the purchase money and interest on said land, and on February 1, 1907, the county clerk of said county issued and transmitted to the auditor of state his certificate as follows:

"I, A. V. Hill, County Clerk in and for the County and State aforesaid, do hereby certify that the full amount of principal and all interest due thereon, upon the following described State School-land, has been fully paid, to-wit: The Southeast Quarter (S. E. ¼) of Section 16, Township 1, Range 34 Appraised value of the land per acre $3.00; name of person to whom sold A. B. Thomas; date of sale, Dec. 23, 1884; price per acre, $3.00.

16

Date. Mo.	Day.	Year.	Payments by whom made.	Amount of principal.	Amount of int.
Dec.	23,	1884.	A. B. Thomas	$48.00	
Dec.	8,	1885.	George Hocknell		25.92
Dec.	22,	1886.	John Hagener		25.92
Feb.	2,	1888.	W. C. & J. H. Hagener		25.92
Nov.	26,	1888.	W. C. & J. H. Hagener		25.92
Dec.	13,	1889.	W. C. & J. H. Hagener		25.92
Dec.	24,	1890.	W. C. & J. H. Hagener		25.92
Dec.	22,	1891.	W. C. & J. H. Hagener		25.92
June	3,	1893.	W. C. & J. H. Hagener		25.92
Jan.	12,	1894.	W. C. & J. H. Hagener		25.92
Apr.	4,	1895.	W. C. & J. H. Hagener		25.92
Apr.	24,	1896.	W. C. & J. H. Hagener		25.92
Sept.	25,	1897.	W. C. & J. H. Hagener		25.92
Oct.	31,	1898.	W. C. & J. H. Hagener		25.92
Sept.	28,	1903.	C. F. Howard		51.84
Nov.	2,	1901.	W. C. & J. H. Hagener		51.84
Feb.	1,	1907.	Fred Robertson & W. J. Ratcliff.	$432.00	67.96
			Total	$480.00	$534.52

See order of Supreme Court attached hereto.

I further certify, that Fred Robertson & W. J. Ratcliff of Rawlins County, Kansas, *is* entitled to a patent for said land.

Witness my hand and official seal, this 1st day of Feb., A. D. 1907.

[SEAL.] A. V. HILL,
County Clerk."

Under date of February 4, 1909, a patent signed by E. W. Hoch, Governor, was duly issued to said Fred Robertson and W. J. Ratcliff for said land.

Plaintiffs also introduced in evidence the following:

17 *"Quitclaim and Assignment.*

"For and in consideration of the sum of One Dollar and other good and valuable considerations, we hereby sell, assign, transfer and deliver to Fred Robertson and W. J. Ratcliff, of the county of Rawlins and State of Kansas, three Certificates of Purchase of School-land, to-wit:

"One certificate of purchase of school-land, covering the Northwest Quarter of Section Sixteen, in Township One South, Range Thirty-four, West of the 6th P. M. in Rawlins County, Kansas, issued by the County Clerk of Rawlins County, Kansas, upon the 23rd day of December, 1884, to A. J. Thomas, which was subsequently and, upon the 28th day of October, 1901, sold and assigned to the undersigned grantor, John H. Hagener;

"One Certificate of Purchase of School Land, covering the Southwest Quarter of Section Sixteen, in Township One South, Range Thirty-four West of the 6th P. M., in Rawlins County, Kansas, issued by the County Clerk of Rawlins County, Kansas, upon the 23rd day of December, 1884, to R. F. Crooch, and which certificate of purchase of school land was subsequently and upon the 28th day of October, 1901, sold and assigned to the undersigned grantor, John H. Hagener;

"One Certificate of Purchase of School-Land, covering the Southeast Quarter of Section Sixteen, Township One, South, Range Thirty-four West of the 6th P. M., in Rawlins County, Kansas, which certificate of purchase of school land was issued by the County Clerk of Rawlins County, Kansas, on December 23rd, 1884, to A. B. Thomas, and which certificate of purchase of school land was, subsequently and upon the 28th day of October, 1901, sold and assigned to the undersigned grantor, John H. Hagener.

18 "And in further exchange for said One Dollar and other good and valuable considerations, we, the undersigned grantors, John H. Hagener and Catherine E. Hagener, husband and wife, hereby sell, assign, quitclaim and convey unto said Fred Robertson and W. J. Ratcliff, all our right, title and interest in and to the real estate hereinbefore described, to have and to hold the same together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

"And we do further sell and assign unto said Fred Robertson and W. J. Ratcliff all rents, issues and profits of said real estate, which have in any way accrued to us, or either of us, the said grantors at any time, and during all the time since October 28, 1901.

Witness our hands this 19th day of June, 1907.

JOHN H. HAGENER.
CATHERINE E. HAGENER."

The foregoing assignment was duly acknowledged by said John H. Hagener and Catherine E. Hagener before B. F. Thacker, a Notary Public of Cass County, Illinois, on June 19, 1907.

Plaintiffs also offered evidence showing possession of the lands by the defendants at the time of the commencement of the action, and the value of the rents and profits thereof for 1905, 1906 and 1907.

On their behalf the defendants offered the following additional matters in evidence:

19 *"Tax Sale Certificate—Property Bid Off by the County.*

$19.90.

No. 506.

STATE OF KANSAS,
Rawlins County, ss:

I, the undersigned, County Treasurer of said County, do hereby certify, that at a public sale of real property for delinquent taxes at my office, at the county seat of said county, on the 3rd day of Sept., A. D. 1901, the following described property, situated in said County and State of Kansas, to-wit:

Description.	Sec.	Town.	Range	No. Acres.	Amount.
S. E.	16	1	34		$19.50
				Fee	.50

Was bid off for said county, for the sum of Fourteen and 80–100 Dollars and that C. F. Howard has paid into the County Treasury of said County, for said property, the sum of Nineteen and 90–100 Dollars a sum equal to the costs of redemption of the same at this time. And said purchaser will be entitled to a deed for said property on the 3rd day of Sept., A. D. 1904, unless the same is redeemed in accordance to the provisions of law.

In testimony whereof, I have hereunto set my hand, this 28th day of September, 1903.

F. L. SCHWAB,
County Treasurer."

(Endorsed on back as follows:)

"County Clerk's Assignment.

In consideration of the payment of Nineteen and 90–100 Dollars, into the County Treasury of the within named county and by virtue of authority in me vested by law, I the undersigned County
20 Clerk of said County, do hereby assign and transfer the within certificate and all the interest of said county in and to said property, to the within named purchaser, C. F. Howard.

[SEAL.] H. W. ROBERTSON,
County Clerk."

"Certificate of Purchase of School Lands Sold for Taxes.

STATE OF KANSAS,
Rawlins County, ss:

"Whereas, on the 23rd day of Dec., A. D. 1884, the county treasurer of said county sold to A. B. Thomas under the provisions of an act of the Legislature of the State of Kansas entitled An Act to provide for the sale of School Lands, approved February 22, 1884, and

all acts amendatory of and supplemental thereto, the following described land situated in said county, to-wit: The South East Quarter of Section No. 16, in Township No. 1, Range No. 34 containing 160 acres, the same being State School land for the sum of Four Hundred Eighty Dollars, and a certificate of purchase was duly issued to said purchaser; and

"Whereas, The said A. B. Thomas paid on said purchase the sum of Forty-eight Dollars as principal, and the further sum of Four Hundred Fourteen & 72–100 Dollars as interest on deferred payments, and

"Whereas, Said certificate of purchase was, on the 5th day of Dec., 1885, duly assigned to one William C. & John H. Hagener; and

"Whereas, on the 3rd day of Sept., A. D. 1901, at a sale made by the County Treasurer of said county of lands for delinquent taxes, for the year A. D. 1900, and charges thereon, one Rawlins County purchased the South East Quarter of said Section No. 16, in Township No. 1, Range No. 34, containing 160 acres, for the sum
21 of Fourteen & 80–100 Dollars, and the tax-sale certificate thereto was afterwards on, to-wit, the 28th day of Sept., A. D. 1903, duly assigned to C. F. Howard, the present holder thereof; and

"Whereas, More than one year has elapsed from the date of the certificate of sale of said land for said taxes, and said land has not been redeemed from said tax sale; and

"Whereas, The said C. F. Howard has paid to the County Treasurer of said county the sum of — Dollars as principal, and the further sum of Fifty-one & 84–100 Dollars as interest, the same being the amount in full of all installments of princepal and interest now due on the original certificate of purchase of said land on the date hereof; and

"Whereas, The said C. F. Howard has given unto the state of Kansas a bond, such as was by law required of the purchaser of the School Land above described in the first instance;

"Therefore, The said C. F. Howard, his heirs or assigns, will be entitled to a patent from the State of Kansas to the land last above described, on or before the 23rd day of Dec., A. D. 1904, upon the payment of the sum of Four Hundred Thirty-two Dollars (that sum being the balance of the purchase money therefor,) payable in twenty years from the date of the original certificate of purchase, or in installments of not less than twenty-five dollars each, with interest upon the balance unpaid at the rate of 6 per cent per annum, and the surrender of this certificate, together with the tax-sale certificate, to the Auditor of State.

"In Witness Whereof, I have hereunto signed my name and affixed my official seal, at my office in Atwood, in said county, this 28th day of Sept., A. D. 1903.

[SEAL.]

H. W. ROBERTSON,
County Clerk."

22 *"Renewal Certificate of Purchase of School Lands.*

THE STATE OF KANSAS,
Rawlins County, ss:

"That, Whereas, A. B. Thomas did, on the 23rd day of December, A. D. 1884, purchase from the State of Kansas, for the sum of $480.00, the following State school-land, situated in Rawlins County, State of Kansas, and described as follows, to-wit: The South East quarter of section No. 16, township No. 1, range No. 34, containing 160 acres;

"And Whereas, There has been paid upon the purchase price of said land the sum of $48.00, leaving the sum of $432.00 due and unpaid upon said land;

"And Whereas, By the provisions of an act of legislature of the State of Kansas, approved March 6, 1883, entitled An act to amend section 1 of chapter 162 of the laws of 1879, being an act for the regulation of common schools, approved March 12, 1879, and acts amendatory and supplemental thereto, additional time was granted to purchaser- of school-land who are not in default in the payment of interest or taxes due upon said land;

"And Whereas, C. F. Howard, assignee of the original purchaser of the above-described tract of land, has been granted an extension of time in the payment of the purchase-price of land under the provisions of the act last hereinbefore mentioned;

"Therefore, The said C. F. Howard, his heirs or assigns, will be entitled to a patent from the State of Kansas to the land within described on the 18th day of December, A. D. 1923, upon the payment of the sum of $432.00, that being the balance of the purchase money therefor, payable in twenty years, or in installments of not less than twenty-five dollars each, with interest upon the balance unpaid at the rate of four per cent per annum payable annually.

23 "The purchaser can at any time procure his patent upon the payment of the purchase money, with four per cent interest from the date of renewal until the date of last payment.

"In witness whereof I have hereunto signed my name and affixed the seal of Rawlins County, this 18th day of December, A. D. 1903.

[SEAL.] H. W. ROBERTSON,
County Clerk."

Like proceedings were shown as to the Southwest quarter and assignment to Fred Howard.

Subsequent interest, prior to the commencement of this suit, was paid by C. F. Howard and Fred Howard, respectively, as called for by said certificates of purchase.

Defendants also offered evidence on the subject of rents and profits.

In rebuttal, the plaintiffs introduced evidence as to the proceedings on which the land was sold for taxes and certificate assigned to the defendants, the testimony showing that the tax proceedings were irregular and voidable.

The plaintiffs introduced further evidence regarding the proceedings in bankruptcy, showing that the trustee made his final report therein November 20, 1907; that payments were made to the creditors of the bankrupt September 30, 1907, being a first and final
24 dividend of 3 6/10 per cent paid out of the assets of Hagener Brothers, a firm composed of W. C. Hagener and John H. Hagener, who were adjudged bankrupts in the same proceedings with John H. Hagener individually, and that individual creditors of John H. Hagener were paid a dividend of 30%.

An order was made by said bankrupt court under date of January 23, 1903, discharging said John H. Hagener from all debts and claims which were provable against his estate and which existed on October 28, 1902.

It was further agreed on the trial that on August 8, 1901, the Board of County Commissioners of Rawlins County, Kansas, adopted the provisions of an act entitled "An act regulating the sale of real estate for delinquent taxes in such counties as shall adopt the provisions of this act," being chapter 162 laws of 1891, and that the same was in force at the time of the tax sales herein referred to.

It was further stipulated and agreed that the evidence introduced in the case against C. F. Howard shall be taken and considered as evidence in the case against Fred Howard by the same plaintiffs, and it was agreed that all the evidence as to the claims and rights of the respective parties as they affected the Southwest quarter of said
25 section 16 is the same as that introduced with reference to the Southeast quarter of said section.

The findings of the court were the same with reference to the two quarters, with the exceptions of the description of the land and the names of the defendants.

The court made findings of fact as follows:

"This is an action in ejectment, brought by the said plaintiffs against the defendants to recover possession of the Southeast Quarter of Section Sixteen (16) in Township One (1), of Range Thirty-four (34), in Rawlins County Kansas, and for the rents of the same. At the March 1908, term of the court a jury was duly waived by all the parties and the trial was had to the Court. At the same time, the parties in this action and also the parties in the action number 2675, pending in this court in which the plaintiffs in this action are also plaintiffs, and Fred Howard and John Nevil are defendants, agreed in open court that whatever judgment and decision of this court might be in this, first mentioned action No. 2676 the same should be held and considered to be applicable to and a determination of the last mentioned case, all parties waiving a jury in said action as in the first. This action having been duly submitted to the court, the same was by the court taken under advisement until the November, 1908, term of this court.

"1st. The land involved in this suit is what is known in this state as school land and the plaintiffs claim title thereto under the original purchase thereof, and from assignments had from him and his grantors and the defendant C. F. Howard, claims title and
26 ownership to the land by virtue of certain tax proceedings and school land contract sale hereinafter referred to.

"2nd. On the 22nd day of December, 1884, a certificate of purchase was, by the county clerk of said Rawlins County, duly issued to a qualified purchaser for the sum of $480.00, and the purchaser at that time duly paid the one tenth thereof being $48.00, and by a succession of assignments one John H. Hagener became the owner of certificate of purchase and all rights to the land thereby contracted for or conveyed. The said Hagener became such owner on the 28th day of October, 1901.

"3rd. Some time prior to the sale of land for taxes in said county, on September 3rd, 1901, the provisions of chapter 162, Laws of Kansas of 1891, being paragraph 7659 of the General Statutes of the State of Kansas for 1901, was duly adopted by said county and such law so adopted remained in full force and effect during all the years relating to the tax proceedings hereinafter mentioned.

"4th. On the 3rd day of September, 1901, at a sale of lands for said county for delinquent taxes, the said land was by the county treasurer of said county of Rawlins under and by virtue of the provisions of said chapter 162, Laws of Kansas for 1891, bid off in the name of said county for the delinquent taxes of the year 1900, for the sum of $14.80, and afterwards and on September 28, 1903, the county clerk of said county assigned the tax sale certificate to said land to defendant C. F. Howard for the sum of $19.90.

"5th. The said sale of lands was had and held under and by virtue of a notice of such sale in words and figures as follows: 'Delinquent Tax List. Office of County Treasurer, Rawlins County, Kansas, Atwood, Kansas, July 15, 1901. Notice is hereby given that taxes for the year 1900 on the following land and town lots remain due
27 and unpaid, and so much of each lot or parcel of land as may be necessary will be sold at the county treasurer's office at public sale on the first Tuesday in September, 1901, and the next succeeding days, for the taxes, costs and penalties. F. L. Schwab, County Treasurer.' Then follows a list of this and other lands.

"6th. Proof of the publication of this notice was never transmitted or deposited in the county clerk's office of said county. As a part of the costs of the assignment of said tax sale certificate and included therein were the costs of sale of said land for the years of 1902 and 1903, and a redemption fee of fifty cents.

"7th. That upon these tax proceedings the county clerk of said county executed to defendant, Howard, a certificate of purchase of school land, upon the 28th day of September, 1903, afterwards and on December 18, 1903, the said clerk issued to defendant Howard a renewal certificate of purchase, in place of the former, and by virtue thereof defendant Howard entered into possession of said land and has ever since held possession thereof and received the rents thereon. Defendant Nevil makes no claim by answer, or otherwise, in this case. Upon these tax proceedings and certificate of school land issued by virtue thereof defendant Howard claims the right to said land.

"8th. In 1904, and prior to November 12th of said year, the said John H. Hagener was in the United States District Court, Southern Division of the State of Illinois, and by virtue of the judgment and

order thereof, duly adjudged a bankrupt, and all of his property, including the said certificates of purchase of the land involved in this action were placed in the hands and custody of said court as the property and assets of said bankrupt's estate, and one R. R. Hewitt was duly appointed and qualified as the trustee of said bankrupt's estate, and he duly entered upon his duties as such officer.

28 "9th. That on the 12th day of November, 1904, by virtue of an order made by said court so to do a public sale, at the City of Beardstown, in the State of Illinois was had, by the said trustee, of the assets of said bankrupt, including the said certificate of purchase and at such sale one Henry Fraumann offered by his bid the sum of $115.00 for said certificate of purchase and some other property of said bankrupt, and the said bid was, by the said trustee, accepted, and the sale being afterwards reported to said court, the same was approved and confirmed by said court, and by virtue thereof the said trustee on Nov. 30, 1904, assigned and delivered the said certificate of purchase to the said Henry Fraumann.

"10th. That afterwards, the said Henry Fraumann, and his wife, on July 19th, 1905, sold, assigned and transferred and delivered the said certificate of purchase and his right to any rents of said lands, if any he had therein, to plaintiff, Fred Robertson, and thereafter and on the 5th day of August, 1905, the said Fred Robertson and wife, sold, assigned and delivered an undivided half interest in and to said certificate to said land, if any he had, as well as an undivided one half interest in and to any rents or profits he had therein to the said W. J. Ratcliff.

"11th. That thereafter and on the 19th day of June, 1907, the said John H. Hagener and wife made, executed and delivered to the plaintiffs a quit-claim deed to said land, and also their assignment of said certificate of purchase as well as their rights, if any, in and to any rents and profits of said land.

"12th. That upon the 20th day of November, 1907, the said John H. Hagener was duly discharged as such bankrupt from all his debts provable under the bankrupt law, and thereafter and on the same day the said R. R. Hewitt, as such trustee, was duly discharged and the said bankrupt proceedings were fully and finally closed up and disposed of.

29 "13th. That said John H. Hagener and his grantors paid all the taxes upon said land up to the year 1900, and caused to be broken all of land, before the defendant acquired his tax sale certificate to said land.

"14th. On August 15, 1905, plaintiffs tendered to the County Treasurer of said County, the sum of $630.00 lawful money, $170.00 of which was for the benefit of defendant Howard, and which was the full amount that was then due the State of Kansas, the said County of Rawlins and the defendant, Howard, each of which tenders were refused, although they fully covered everything that was then due and such tenders have ever since been held good.

"15th. That thereafter and on the 5th day of January, 1907, in an action then pending in the Supreme Court of the State of Kansas, in which the plaintiffs herein were plaintiffs and the County, Treas-

urer of said county was defendant, a peremptory writ of mandamus was, by said court, issued to said County Treasurer to take the said money so tendered to him by said plaintiffs, the said $630.00, and as such officer receipt therefor, which he did, and such order, so far as the receipt and acceptance of such tender is final only as to the parties to said action, and thereafter and before the commencement of this action a patent for said land was issued to plaintiffs.

"16th. That the rents and profits of said land so far as received by defendant, Howard, amount to the sum of One Hundred and Fifty Dollars and the rental value of said land is $50.00 per annum.

Conclusions of Law.

"1st. The plaintiffs, Fred Robertson and W. J. Ratcliff, by virtue of the various conveyances, assignments and certificates executed and delivered to them, by the various parties named in the special findings of fact and by the acts done by them therein stated, have acquired a full and complete title and ownership in and to the land described and are the owners of the same, and are entitled to the possession thereof.

2nd. That as the Board of County Commissioners of Rawlins County have adopted the provisions of chapter 162, Laws of Kansas, 1891, being paragraph 7659 of the General Statutes of the State of Kansas for 1901, and the same being in full force and effect at the time of the sale of said land for delinquent taxes, and such sale being under the provisions of such laws, and the said property having been bid in by the county treasurer for said county, and three years not having expired at the time of the execution and delivery of the said tax sale certificate by the county clerk to the defendant, Howard, the said county clerk had no authority or power to make such assignment and such act on his part as such officer gave no interest in and to said land to said defendant, Howard, and the school land certificate issued to defendant, Howard, being based upon such illegal acts of such county clerk, it, as well as such tax sale certificate, was and is absolutely void and has no effect.

"3rd. The defendant, Howard, having paid the taxes on said land in the sum of $170.00 is entitled to received the same from the county treasurer of said county in whose hands, as such officer, the plaintiffs deposited for defendant's use.

"4th. That the plaintiffs are entitled to the possession of the said land as such owners, and to a judgment for the sum of $150.00 rentals received by defendant, with interest thereon from this date at the rate of 6% per annum.

"5th. As plaintiffs made a full and complete legal tender of said taxes so paid by defendant, before the commencement of this action, which tender has been kept good ever since, plaintiffs are entitled to the immediate possession of said land.

"6th. That the defendant, Howard, pay the costs of this suit.

"7th. That the defendant John Nevil has no interest in said land or in this action."

The foregoing findings of fact and conclusions of law were filed November 12, 1908.

On November 12, 1908, the defendant moved the court for judgment in his favor on the findings of fact, which motion was by the court overruled, to which ruling the defendant duly excepted at the time.

Thereupon, on the same day, defendant filed his motion for a new trial, setting up all the statutory grounds therefor, among them being that the decision of the court was not sustained by sufficient evidence and that it was contrary to law. Said motion was, by the court, on said November 12, 1908, overruled, to which ruling the defendant duly excepted at the time.

The court thereupon rendered judgment that the plaintiffs have immediate possession of said land and that they have and recover from the defendant the sum of $150.00 for rents and profits. On application of defendant and for good cause shown time was given within which to make and serve a case for the Supreme Court. The case made was duly settled and signed within the time allowed on April 5, 1909.

32 Like findings of fact and conclusions of law were made and subsequent proceedings had and judgment entered in the case against Fred Howard.

J. P. NOBLE,
L. H. WILDER,
T. F. GARVER,
R. D. GARVER,
Attorneys for Appellants.

33 Be it further remembered, that afterward on the 6th day of of January, 1910, the same being one of the regular judicial days of the January term, 1910, of the supreme court of the state of Kansas, in session at the supreme Court room in the city of Topeka, the following proceeding among others was had and remains of record in words and figures as follows, to-wit:—

34 *Journal Entry of Consolidation.*

Journal "NN."

Supreme Court, State of Kansas, January Session, January Term, 1910.

THURSDAY, *January 6th*, 1910.

No. 16462.

C. F. HOWARD, Plaintiff in Error,
v.
FRED ROBERTSON et al., Defendants in Error.

No. 16463.

FRED HOWARD, Plaintiff in Error,
v.
FRED ROBERTSON et al., Defendants in Error.

Now comes C. F. Howard, plaintiff in error in 16462 and Fred Howard plaintiff in error in 16463, by T. F. Garver their attorney, and shows to the court that the records in these two cases are identically the same with the exception of the titles of the cases, and that the legal questions for determination by this court are identically the same in each case, and presents their written motion for an order consolidating these two cases for the purposes of hearing and determination; thereupon, for good cause shown, it is ordered that said motion for consolidation be allowed and that these cases be consolidated for the purposes of abstracting and briefing, hearing and determination.

35 Be it further remembered, that on the 9th day of March 1910, the same being one of the regular judicial days of the January Term, 1910, of the supreme court of the state of Kansas, in session at the supreme court room in the city of Topeka, the following proceeding among others was had and remains of record in words and figures as follows, to-wit:

36 *Journal Entry of Submission.*

Journal "NN."

Supreme Court, State of Kansas, March Session, January Term, 1910.

WEDNESDAY, *March 9th*, 1910.

No. 16462.

C. F. HOWARD, Pl'ff in Error,

v.

FRED ROBERTSON et al., Def'ts in Error.

No. 16463.

FRED HOWARD, Pl'ff in Error,

v.

FRED ROBERTSON et al., Def'ts in Error.

This cause comes on to be heard on the petition in error and transcript of the record of the district court of Rawlins county; thereupon, after oral argument by T. F. Garver for the plaintiff in error and by John E. Hessin for the defendants in erorr, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

37 Be it further remembered, that on the 11th day of June 1910, the same being one of the regular judicial days of the January Term, 1910, of the supreme court of the state of Kansas, in session at the supreme court room in the city of Topeka, the following proceeding among others was had and remains of record in words and figures as follows, to-wit:

38 *Journal Entry of Judgment.*

Journal "OO."

Supreme Court, State of Kansas, June Session, January Term, 1910.

SATURDAY, *June 11th*, 1910.

No. 16462.

FRED ROBERTSON et al., Appellees,

vs.

C. F. HOWARD, Appellant.

No. 16463.

FRED ROBERTSON et al., Appellees,

vs.

FRED HOWARD, Appellant.

This cause comes on for decision; and thereupon, it is ordered and adjudged that the judgment of the court below be affirmed. It

is further ordered that the appellant pay the costs of this case in this court taxed at $—, and hereof let execution issue.

39 And on the same day, to-wit the 11th. day of June A. D. 1911, there was filed in the office of the clerk of the supreme court of the state of Kansas, a syllabus and opinion, which syllabus and opinion *is* in the words and figures, as follows, to-wit:

40 No. 16462.

FRED ROBERTSON and W. J. RATCLIFF, Appellees,
v.
C. F. HOWARD, Appellant.

Appeal from Rawlins County. Affirmed.

No. 16463.

FRED ROBERTSON and W. J. RATCLIFF, Appellees,
v.
FRED HOWARD, Appellant.

Appeal from Rawlins County. Affirmed.

Syllabus by the Court.

SMITH, *J.*:

1. The sale by a trustee in bankruptcy under the orders of the United States district court in the state of Illinois of a certificate of sale of state school lands in Kansas, conveys to the purchaser of such certificate no interest in the lands in this state—none of the steps required by the laws of the United States being taken to sell, within this state, the lands as such.

2. The contract between the bankrupt and the state of Kansas evidenced by the certificate of purchase, a part of the purchase price being paid, conveyed to the purchaser an equitable title to the land.

3. The purchaser's equitable interest in such land is real-estate, and as such is subject to sale on execution. Sec. 9037 of the General Statutes of 1909, subd. 8; Poole v. French, 71 Kan. 391.

41 4. The purchaser's equitable interest in such land is real estate, and as such is subject to sale on execution. Sec. 9037 of the General Statutes of 1909, subd. 8; Poole v. French, 71 Kan. 391.

5. Upon an adjudication of bankruptcy and the appointment and qualification of a trustee, the title and control of all the bankrupt's non-exempt property vests in the trustee for the purpose of liquidating the debts of the bankrupt under the orders of the court. Subject to this purpose, the bankrupt retains an interest in the property, which, in case the property is not needed or not disposed of for such purpose and the bankrupt is discharged, recalls to the bankrupt all rights thus vested in the trustee.

6. If during the pendency of the bankrupt proceedings the bank-

rupt conveys all his interest in any such property and thereafter is fully discharged, and any property so conveyed has not been used or disposed of, the reversionary title thereto follows such conveyance and vests in the grantee.

42 No. 16462, No. 16463.

Statement.

Case No 16462 was tried in the court below without a jury, under an agreement that all the evidence, findings and proceedings should apply equally to case No. 16463, and the findings of fact and conclusions of law made by the court therein are as follows:

"This is an action in ejectment, brought by the said plaintiffs against the defendants to recover possession of the southeast quarter of section sixteen (16) in township one (1), of range thirty-four (34), in Rawlins county, Kansas, and for the rents of the same. At the March 1908, term of the court a jury was duly waived by all the parties and the trial was had to the court. At the same time, the parties in this action and also the parties in the action number 2675, pending in this court in which the plaintiffs in this action are also plaintiffs, and Fred Howard and John Nevil are defendants, agreed in open court that whatever judgment and decision of this court might be in this first mentioned action No. 2676 the same should be held and considered to be applicable to and a determination of the last mentioned case, all parties waiving a jury in said action as in the first. This action having been duly submitted to the court, the same was by the court taken under advisement until the November, 1908, term of this court.

"1st. The land involved in this suit is what is known in this state as school land and the plaintiffs claim title thereto under the original purchase thereof, and from assignments had from him and his grantors and the defendant C. F. Howard, claims title and ownership to the land by virtue of certain tax proceedings and school land contract sale hereinafter referred to.

43 "2nd. On the 22nd day of December, 1884, a certificate of purchase was, by the county clerk of said Rawlins county, duly issued to a qualified purchaser for the sum of $480.00, and the purchaser at that time duly paid the one-tenth thereof being $48.00, and by a succession of assignments one John H. Hagener became the owner of certificate of purchase and all rights to the land thereby contracted for or conveyed. The said Hagener became such owner on the 28th day of October, 1901.

"3rd. Some time prior to the sale of land for taxes in said county, on September 3rd, 1901, the provisions of chapter 162, Laws of Kansas of 1891, being paragraph 7659 of the General Statutes of the State of Kansas for 1901, was duly adopted by said county and such law so adopted remained in full force and effect during all the years relating to the tax proceedings hereinafter mentioned.

"4th. On the 3rd day of September, 1901, at a sale of lands for said county for delinquent taxes, the said land was by the county treasurer of said county of Rawlins under and by virtue of the pro-

visions of said chapter 162, Laws of Kansas for 1891, bid off in the name of said county for the delinquent taxes of the year 1900, for the sum of $14.80, and afterwards and on September 28, 1903, the county clerk of said county assigned the tax sale certificate to said land to defendant C. F. Howard for the sum of $19.90.

"5th. The said sale of lands was had and held under and by virtue of a notice of such sale in words and figures as follows: 'Delinquent Tax List. Office of county treasurer, Rawlins county, Kansas, Atwood, Kansas, July 15, 1901. Notice is hereby given that taxes for the year 1900 on the following land and town lots remain due and unpaid, and so much of each lot or parcel of land as may be necessary will be sold at the county treasurer's office at public sale on the first Tuesday in September, 1901, and the next succeeding days, for the taxes, costs and penalties. F. L. Schwab, county treasurer.' Then follows a list of this and other lands.

"6th. Proof of the publication of this notice was never transmitted or deposited in the county clerk's office of said county. As
44 a part of the costs of the assignment of said tax sale certificate and included therein were the costs of sale of said land for the years of 1902 and 1903, and a redemption fee of fifty cents.

"7th. That upon these tax proceedings the county clerk of said county executed to defendant, Howard, a certificate of purchase of school land, upon the 28th day of September, 1903, afterwards and on December 18, 1903, the said clerk issued to defendant Howard a renewal certificate of purchase, in place of the former, and by virtue thereof defendant Howard entered into possession of said land and has ever since held possession thereof and received the rents thereon. Defendant Nevil makes no claim by answer, or otherwise, in this case. Upon these tax proceedings and certificate of school land issued by virtue thereof defendant Howard claims the right to said land.

"8th. In 1904, and prior to November 12th of said year, the said John H. Hagener was in the United States District Court, Southern Division of the state of Illinois, and by virtue of the judgment and order thereof, duly adjudged a bankrupt, and all of his property, including the said certificates of purchase of the land involved in this action were placed in the hands and custody of said court as the property and assets of said bankrupt's estate, and one R. R. Hewitt was duly appointed and qualified as the trustee of said bankrupt's estate, and he duly entered upon his duties as such officer.

"9th. That on the 12th day of November, 1904, by virtue of an order made by said court so to do a public sale, at the city of Beardstown, in the state of Illinois was had, by the said trustee, of the assets of said bankrupt, including the said certificate of purchase and at such sale one Henry Fraumann offered by his bid the sum of $115.00 for said certificate of purchase and some other property of said bankrupt, and the said bid was, by the said trustee, accepted, and the sale being afterwards reported to said court, the same was approved and confirmed by said court, and by virtue

thereof the said trustee on Nov. 30, 1904, assigned and delivered the said certificate of purchase to the said Henry Fraumann.

45 "10th. That afterwards, the said Henry Fraumann, and his wife, on July 19th, 1905, sold, assigned and transferred and delivered the said certificate of purchase and his right to any rents of said lands, if any he had therein, to plaintiff, Fred Robertson, and thereafter and on the 5th day of August, 1905, the said Fred Robertson and wife, sold, assigned and delivered an undivided half interest in and to said certificate to said land, if any he had, as well as undivided one half interest in and to any rents or profits he had therein to the said W. J. Ratcliff.

"11th. That thereafter and on the 19th day of June, 1907, the said John H. Hagener and wife made, executed and delivered to the plaintiffs a quit-claim deed to said land, and also their assignment of said certificate of purchase as well as their rights, if any, in and to any rents and profits of said land.

"12th. That upon the 20th day of November, 1907, the said John H. Hagener was duly discharged as such bankrupt from all his debts provable under the bankrupt law, and thereafter and on the same day the said R. R. Hewitt, as such trustee, was duly discharged and the said bankrupt proceedings were fully and finally closed up and disposed of.

"13th. That said John H. Hagener and his grantors paid all the taxes upon said land up to the year 1900, and caused to be broken all of land, before the defendant acquired his tax sale certificate to said land.

"14th. On August 15, 1905, plaintiffs tendered to the county treasurer of said county, the sum of $630.00 lawful money, $170.00 of which was for the benefit of defendant Howard, and which was the full amount that was then due the state of Kansas, the said county of Rawlins and the defendant, Howard, each of which tenders were refused, although they fully covered everything that was then due and such tenders have ever since been held good.

"15th. That thereafter and on the 5th day of January, 1907, in an action then pending in the supreme court of the state of Kansas, in which the plaintiffs herein were plaintiffs and the county treasurer of said county was defendant, a peremptory writ of mandamus was by said court issued to said county treasurer to

46 take the said money so tendered to him by said plaintiffs, the same $630.00, and as such officer receipt therefor, which he did, and such order, so far as the receipt and acceptance of such tender is final only as to the parties to said action, and thereafter and before the commencement of this action a patent for said land was issued to plaintiffs.

"16th. That the rents and profits of said land so far as received by defendant, Howard, amount to the sum of one hundred and fifty dollars and the rental value of said land is $50.00 per annum.

"Conclusions of Law.

"1st. The plaintiffs, Fred Robertson and W. J. Ratcliff, by virtue of the various conveyances, assignments and certificates executed and delivered to them, by the various parties named in the special findings of fact and by the acts done by them therein stated, have acquired a full and complete title and ownership in and to the land described and are the owners of the same, and are entitled to the possession thereof.

"2nd. That as the board of county commissioners of Rawlins county have adopted the provisions of chapter 162, Laws of Kansas, 1891, being paragraph 7659 of the General Statutes of the state of Kansas for 1901, and the same being in full force and effect at the time of the sale of said land for delinquent taxes, and such sale being under the provisions of such laws, and the said property having been bid in by the county treasurer for said county, and three years not having expired at the time of the execution and delivery of the said tax sale certificates by the county clerk to the defendant, Howard, the said county clerk had no authority or power to make such assignment and such act on his part as such officer gave no interest in and to said land to said defendant, Howard, and the school land certificate issued to defendant, Howard, being based upon such illegal acts of such county clerk, it, as well as such tax sale certificate, was and is absolutely void and has no effect.

47 "3rd. The defendant, Howard, having paid the taxes on said land in the sum of $170.00 is entitled to receive the same from the county treasurer of said county in whose hands, as such officer, the plaintiffs deposited for defendant's use.

"4th. That the plaintiffs are entitled to the possession of the said land as such owners, and to a judgment for the sum of $150.00 rentals received by defendant, with interest thereon from this date at the rate of 6% per annum.

"5th. As plaintiffs made a full and complete legal tender of said taxes so paid by defendant, before the commencement of this action, which tender has been kept good ever since, plaintiffs are entitled to the immediate possession of the land.

"6th. That the defendant, Howard, pay the costs of this suit.

"7th. That the defendant John Nevil has no interest in said land or in this action."

48 The opinion of the court was delivered by

SMITH, *J.*:

While the evidence of records and written instruments in the case shows that the sale even of the school land certificate was very irregular, is not void, we shall consider this case on the questions of law involved, and not review the findings of fact made by the court.

A principal question involved, then, is whether the sale of the certificates by the trustee in bankruptcy conveyed any interest in the land, or whether it was necessary in order to divest the certifi-

cate holder of his title in the land to appraise and advertise the land itself for sale and to sell it in the method provided by the laws of the United States. No attempt was made to sell the land as such; hence, of course, no steps prescribed by law for the sale of the land were taken.

The certificate is evidence of a contract between the state and the purchaser of the school land, and when such contract is executed and the purchaser makes a payment thereon in execution thereof he becomes the equitable owner of the land, subject to defeasance or forfeiture by noncompliance on his part with the conditions of the contract. The property acquired in the transaction by the purchaser is "land" or "real-property," and is not "personal property." Sec. 9037 of the General Statutes of 1909.

The school land certificate in question is in every legal aspect like the state normal school land certificate involved in Poole v. French, 71 Kan. 391. In that case this court held in substance that the right acquired by the purchaser was an equitable title to the real-estate, the sale of which is evidenced by the certificate, and that such title is subject to sale on execution.

Such interest is also subject to attachment. Travis v. Supply Co. 42 Kan. 625.

It seems apparent if the equitable title may be sold on execution or be subject to attachment in one judicial proceeding, that it cannot in another forum be sold by a judicial transfer of the certificate: else one court may cause a valid sale of the certificate and another of the land at the same time.

49 It is contended by appellees that the sale of the certificates is a sale of the land, while they concede that the sale was irregular and that the law of this state determines the character of the property as real-estate or land.

While the adjudication of bankruptcy conveyed this land and all the property of Hagener to the trustee appointed by the court, the court had no jurisdiction over the land. Its jurisdiction was in personam. Short v. Hepburn, 21 C. C. A. 252.

The attempted sale of the land by the trustee is not simply irregular and erroneous; it is void.

Watson v. Holden, 58 Kan. 657;
McNutt v. Nellens, — Kan. — (May, 1910);
Short v. Hepburn, supra;
Williams v. Nichol, 47 Ark. 254;
Casseday v. Norris, 49 Tex. 613.

The latter case involved the validity of a sale of land in one county at the court house of another county in Texas, under an execution issued upon a judgment rendered by the United States circuit court at Austin, Texas. It is therein said:

"Sales of land made by the United States marshal, under execution, must be made in the county where the land is situated.

"A marshal's sale of land, part of which was in McLennan county, made at the court-house of Bell county, held void as to that part lying out of Bell county" (Syllabus).

The United States district court for the southern district of Illinois has no jurisdiction in Kansas in bankruptcy, and a trustee appointed by it could only sell real-estate in this state under orders procured from some court having jurisdiction therein. 1 U. S. Compiled Statutes, sec. 563, subd. 18. So far as conveying any interest in the lands in question, the sale of the certificates by the trustee is void.

50 Upon the adjudication that Hagener was a bankrupt, and upon the qualification of the trustee appointed by the court, the title to all the property of Hagener, including the land in question, vested in a sense, in the trustee, and when a bankrupt is fully discharged the title to any of his property which had not been disposed of by the trustee reverts to him. But at all times Hagener had an actual interest in the property, which became a perfect title when it was not needed to pay his indebtedness, or when for any reason the trustee was discharged without having used it for that purpose.

This interest in the lands in question, with the rents thereof, Hagener and wife conveyed to the appellees before he was discharged in the bankruptcy proceeding, and upon his discharge all his rights in and to the property held by the trustee reverted to his grantees. As was said in Bird v. Philpott, 69 L. J., Chan. Div. 487, 491:

"The trustee takes all the bankrupt's property for an absolute estate in law, but for a limited purpose—namely, for the payment of creditors. * * * Subject to that, he is a trustee for the bankrupt of the surplus. * * * The bankrupt has not got the ordinary right of a cestui que trust to intervene, until the surplus has been ascertained to exist and all the creditors and interests and costs have been paid. He can not * * * interfere with the administration of the estate in any way, but subject to that, and subject to his non-interference with the administration and with the arrangements of the trustee during the bankruptcy in the due course of the execution of his duty, the bankrupt * * * has a right to the surplus—a right which he can dispose of by * * * deed, or otherwise during the pendency of the * * * bankruptcy even before the surplus is ascertained; although, of course, such disposition will be ineffectual unless there turns out to be a surplus eventually."

See also, In re Evelyn, 63 L. J., Q. B. Div. 658.

If while the bankruptcy proceedings were pending the bankrupt had died intestate there can be no doubt that upon the discharge of the trustee the title to the land would have vested in his

51 heirs. If he had died intestate there can be no doubt that upon the discharge of the trustee the title to the land would have vested in his heirs. If he had died testate it would have vested in his devisee. No reason is apparent why, where he has conveyed away his interest in his lifetime, the title should not vest in his grantee.

It is not contended that the appellants had a valid tax deed, or

its equivalent, to the land. As we have determined that the appellees acquired all of Hagener's interest in the land, it follows that they were entitled to discharge the tax lien of the appellants thereon.

The judgment is affirmed.

52 Be it further remembered, that afterwards on the 28th day of June 1910, there was filed in the office of the clerk of the supreme court of the State of Kansas, a petition for a rehearing of this cause, which petition for a rehearing is in the words and figures, as follows, to-wit:—

53 Kansas State Historical Society.

Filed Jun- 28, 1910. D. A. Valentine, Clerk Supreme Court.

16462 & 3.

In the Supreme Court of the State of Kansas.

No. 16462.

FRED ROBERTSON and W. J. RATCLIFF, Appellees,
vs.
C. F. HOWARD, Appellant.

No. 16463.

FRED ROBERTSON and W. J. RATCLIFF, Appellees,
vs.
FRED HOWARD, Appellant.

Appellant's Petition for a Rehearing.

J. P. Noble, L. H. Wilder, T. F. Garver, R. D. Garver, Attorneys for Appellants.

54 Kansas State Historical Society.

In the Supreme Court of the State of Kansas.

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No. 16463.

FRED ROBERTSON and W. J. RATCLIFF, Appellees,
vs.
FRED HOWARD, Appellant.

Appellant's Petition for a Rehearing.

The appellants ask that a rehearing be granted in this case for the following reasons:

1. The court overlooked, or misunderstood, the facts of this case, as to the interest of John Hagener, the bankrupt, at the time he executed a quit claim deed to appellees.

55 2. The court's decision is unsound in that it did not give proper effect to the bankruptcy act upon the bankrupt's title to or interest in his property after the appointment of a trustee, and to previous decisions of this court.

3. The court overlooked the very material fact that the two English cases, which are cited in the opinion as authority for the decision as to the legal effect of the quit claim deed, were decided under entirely different laws and upon a very dissimilar state of facts.

We, perhaps, owe an apology to the court for not making a fuller argument upon this proposition when the case was submitted, and in assuming that the provisions of the bankruptcy act and the cases cited in our brief were sufficient upon the point. Counsel for appellees apparently had no confidence in such a source of title, for they had not a single word to say in favor of the bankrupt's quit claim conveying any title. That is some excuse for our having taken it as a proposition too plain to warrant elaborate discussion.

I.

The English cases cited in the opinion by Mr. Justice Smith are not authority. In the first place, the facts in those cases did
56 not call for any decision as to the legal effect of a simple quit claim deed, executed by the bankrupt, upon the title to property in the hands of the trustee in bankruptcy. In the Evelyn case, 63 L. J. Q. B. Div. 658, the transfer by mortgage by the bankrupt was of all his "right, title and interest, whatsoever or wheresoever, absolute or contingent," in certain lands. The mortgagee attempted to sell, but subject to all the rights of the trustee. The court simply held that the trustee had no right to complain and could not enjoin such sale.

In Bird v. Philpot, 69 L. J. Ch. Div. 487, the court merely held that property of the bankrupt which is not needed to pay debts reverts to the bankrupt, and that he may transfer such right to the reversion.

These cases were under the English bankruptcy act of 1883. It is sufficient to show the inapplicability of the above cited cases to say that the English act contains no provision vesting title to the bankrupt's property in the trustee. The parts applicable read:

SEC. 54-2: "On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed."

SEC. 50-2: "The trustee shall, in relation to and for the
57 purpose of acquiring or retaining possession of the property of the bankrupt, be in the same position as if he were a receiver of the property appointed by the High Court, and the Court may on his application enforce such acquisition or retention accordingly."

Under this act the bankrupt retained the legal title. It may have

been of little, if any, value to him, but it was something which no doubt he could transfer.

The property vests in the trustee; that is, he is given possession, control and power of disposition, much as a receiver, or executor has, but without being vested with the title. In such cases, the title does not pass; but, by virtue of the official relation, the trustee is given authority to divest one party of the title and invest it in another. The title never vests in a receiver, or executor, except by virtue of special provisions to that end.

The United States bankrupt act of 1867, by sec. 14, provided for the execution of a transfer in writing of the bankrupt's property to the assignee, and, thereupon, "by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee."

The act of 1898, sec. 70, provides: "The trustee of the
58 estate of a bankrupt, upon his appointment and qualification, * * * shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt," to all property of every kind, except such as is exempt.

Under these acts, the whole title and interest of the bankrupt passes; nothing is left in him beyond the bare possibility that there may be a surplus after his debts are paid. But that is a very remote possibility, because only an insolvent can be adjudged a bankrupt, and all reasonable presumption is against there being a surplus.

Vanslyke v. Shryer, 98 Ind. 126, 133.

Moreover, this mere possibility of a reverter, without any vested interest, is no estate and is not transferable—especially not by a mere quitclaim of a present interest.

"A naked possibility of reverter is incapable of alienation or devise, but descends to the heirs. Therefore, if rental property is conveyed to a corporation whose charter subsequently expires or is forfeited, although the property reverts to the grantor and his heirs, such reverter cannot operate to the advantage of his assignees or devisees." Presbyterian Church v. Venable, 159 Ill. 215.

59 "The possibility of a reverter when land has been conveyed on the condition that it shall revert to the grantor if it ceases to be used for church purposes, is not such an interest as he can convey or assign, and hence does not pass by his quitclaim deed executed before the reverter takes place." North v. Graham, 235 Ill. 178.

"But where one grants a base or determinable fee, since what is left in him is only a right to defeat the estate so granted upon the happening of a contingency, there is no reversion in him. That is, he has no future vested estate in fee, but only what is called a naked possibility of reverter, which is incapable of alienation or devise, although it descends to his heirs."

Tiedeman on Real Property (2nd ed.) sec. 385.

"But every right is not the subject of a grant, though it relates to land, or an interest therein. Thus, a bare possibility of an interest

which is uncertain, is not grantable, though a possibility, coupled with a present interest, may be granted." Washburn on Real Property (3rd ed.) page 302.

"A possibility of reverter is, at common law, inalienable, but it may be released to him in possession." 24 Am. & Eng. Ency. of Law, 426.

To same effect are:

McCall v. Railroad Co., 12 N. Y. 121, 134;
Hart v. Gregg, 32 O. St., 502;
Hall v. Nute, 38 N. H., 422;
Dart v. Dart, 7 Conn., 250;
Sloniger v. Sloniger, 161 Ill., 270;
60 Vanslyke v. Shryer, 98 Ind. 126, 133;
Read v. Fogg, 60 Me., 479;
McCrackin v. Wright, 14 Johns 193.

The English statute of 8 & 9 Victoria, Ch. 106, sec. 6, specially authorized the transfer of such contingent interest; and under that statute the transfers involved in the English cases cited in the opinion were made. That statute reads:

"SEC. 6. That after the first day of October one thousand eight hundred and forty-five, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed."

We have no such statute in this state doing away with the common law rule. This is another very good reason why these English decisions should not be cited either as authority or precedent in this case.

II.

The Hagener quit claim conveyed nothing.

Note these facts and dates:

61 Hagener filed his petition in bankruptcy Oct. 7, 1902, and was adjudged a bankrupt Nov. 4, 1902. (Abst. 3.)

R. R. Hewitt was appointed trustee and continued to so act until Nov. 20, 1907, when he was discharged. (Abst. 28.)

Creditors of the bankrupt were paid only 30% of their personal claims, and 3 6-10% of firm claims against Hagener's firm. (Abst. 24.)

The quit claim of Hagener was made June 19, 1907. (Abst. 28.)

This suit was commenced July 12, 1907, more than four months before the trustee was discharged. (Abst. 1.)

The rights of the parties to a suit must be determined as of the time of the commencement of the action. When the Hagener quitclaim was executed, and when this suit was commenced, the absolute title and interest in the land was in the trustee.

The Hagener quitclaim purports to transfer only "all our right,

title and interest in and to the real estate hereinbefore described." (Abst. 18.) Having no vested title or interest, at that time, under the decisions of this court, the mere chance of a future reversion was not affected. Even if affected, there was nothing for the
62 quitclaim to act upon until after this suit was brought. That no such effect can be given to this quitclaim is clear from what this court has heretofore held. And if a quitclaim of a present interest has a well settled legal effect in this state, we should not now be taken across the Atlantic to find a different rule.

"The general doctrine prevailing in the United States is that no estate can be passed by the ordinary terms of a deed, unaccompanied by covenants of warranty, which is not vested in interest at the time; and that estates subsequently acquired, whether by purchase or descent, are unaffected by such previous conveyance in the hands of the grantor, or those claiming under him." Clark v. Baker, 14 Cal. 612, cited with approval in Simpson v. Greeley, 8 Kan. 586, 597.

"A deed containing the words, 'granted, bargained, sold and quitclaimed,' is only a quitclaim deed; and the grantor in the same, who had no title to the land at the time he executed the deed, is not estopped from afterwards acquiring the title as against this grantee." Bruce v. Lake, 9 Kan. 201, 210.

The quitclaim deeds "cannot have any force or effect, because at the time these two deeds were executed Mrs. Carithers (the grantor) had no title to the property to convey, and the deeds being only quitclaim deeds, any after acquired title vesting in Mrs. Carithers would not enure to the benefit of either Mrs. Weaver
63 or Samuel Carithers" (the grantees). Ott v. Sprague, 27 Kan. 620, 623-4.

In that case it was contended that the quitclaim from Mrs. Carithers executed during the life of her husband, conveyed the interest she subsequently acquired as his widow and heir; but the court held otherwise.

"Indeed, the grantee in a quitclaim deed gets nothing except what his grantor in fact owned at the time of the execution of the deed. * * * And such a deed will not estop the maker thereof from afterwards purchasing or acquiring an outstanding adverse title or interest in or to the property and holding it as against his grantee." Price v. King, 44 Kan. 639, 648.

In Knight v. Dalton, 72 Kan. 131, cited in our original brief, a husband quitclaimed all his interest in a tract of land the title to which was then in his insane wife. After her death, his grantee claimed that the title and interest acquired as heir of the wife enured to him. The court said:

"At that time (when quitclaim was executed) the absolute title was in Susan Dalton (the wife). He had no share in the ownership of the land, and, as the trial court rightly held, had nothing to convey. He had no interest whatever, except the possibility that he might outlive his wife and inherit from her in case the property had not been transferred. As he had no estate or vested interest

in the land, his mere quitclaim, if it had been so intended, would not have affected the title nor have carried to the grantee any estate or title which the grantor might subsequently acquire."

64 It might pertinently be suggested that the possibility of the grantor subsequently acquiring an interest was at least as great in the case of an insane wife's property as in the case of a bankrupt estate which was not sufficient to pay creditors.

Much in point is North v. Graham, 235 Ill. 178, where it was claimed that a quitclaim deed carried a subsequently acquired contingent reversion of land. It is a well considered case worthy of study.

"The deed from Boise to McCrackin is a bargain and sale and quitclaim, and he had then no title to convey in the premises; and no title, not then in esse, would pass unless there was a warranty in the deed; in which last case, it would operate as an estoppel, for avoiding circuity of action." McCrackin v. Wright, 14 Johns. 193.

"A conveyance of all the right, title and interest which the grantor has in and to the land described in his deed, conveys only the right, title and interest which he actually has, at the time of the conveyance. It assumes to convey no more. The grant in the deed, is of all his right, title and interest in the land, and not of the land itself, or any particular estate in the land. It passes no estate, which is not then possessed by the party." Coe v. Persons Unknown, 43 Me. 432, 436.

If Hagener had no interest or estate when his quitclaim was made, Robertson and Ratcliff acquired nothing by it. And

65 clearly the trustee then held the absolute title. As to this property, Hagener was then civiliter mortuus.

If more is need that the language of the bankrupt law to convince of the correctness of these propositions, we ask consideration of the following, selected from many similar, decisions:

Beeson v. Shively, 28 Kan. 574;
Herndon v. Howard, 9 Wall. 564;
Bank v. Sherman, 101 U. S. 403;
Bank v. Lasater, 196 U. S. 115;
In re Youngstrom, 153 Fed. 98;
Scruby v. Norman, 91 Mo. App. 517, 520;
Johnson v. Geisriter, 26 Ark. 44;
Robinson v. Denny, 57 Ala. 492;
Buckingham v. Buckingham, 46 O. St. 68;
Hough v. North Adams, 196 Mass. 290;
Saunders v. Mitchell, 61 Miss. 321;
Malone v. Martin, (Ky.) 2 S. W. Rep. 909;
Atwood v. Thomas, 60 Miss. 162;
Vanslyke vs. Shryer, 98 Ind. 127.

We will quote some statements of the law on these propositions as found in the foregoing cases:

"The filing of the petition was a caveat to all the world. It was

in effect an attachment and injunction. Thereafter all the
66 property rights of the debtor were ipso facto in abeyance
until the final adjudication. If that were in his favor
they revived and were again in full force. If it were against him,
they were extinguished as to him and vested in the assignee for
the purposes of the trust with which he was charged. The bank-
rupt became, as it were, for many purposes, civiliter mortuus. Those
who dealt with his property in the interval between the filing of
the petition and the final adjudication, did so at their peril." Bank
v. Sherman, supra.

"The debt sued for, under the bankrupt law, passed to the trustee,
whose duty it was to collect it and pay it over to the creditors of
the bankrupt. It is difficult to see what claim the plaintiff would
have to it even after his discharge, and especially so, since it was
not scheduled by him, and his creditors whose debts have been dis-
charged have not received one farthing from his estate.

It may be that if his estate had been more than sufficient to pay
his debts and the debt in question had been left after his discharge,
that under the law or perhaps an order of the court, the title might
be restored to him; but no such case is before us. The plaintiff is
suing on a chose, the title to which was divested by the adjudication
and which has never been in any way restored. These views are,
as we think, in accord with reason and the great weight of author-
ity." Scruby v. Norman, supra.

"The moment the petition is filed the bankrupt is civilly dead.
During the interval existing between the filing of the petition and
the appointment of the assignee, a condition of things exists not
unlike that in the case of a person dying intestate, and be-
67 fore the appointment of an administrator. On the death of
a person intestate no one is authorized to dispose of or as-
sign his assets. A bankrupt is civiliter mortuus, from the day on
which he files his petition, and during the interval between the
filing of the petition and the appointment of the assignee, no assign-
ment of his assets can be made." Johnson v. Geisriter, supra.

"It is doubtless true, that if after payment of the debts, which
may be proved against the estate of a bankrupt, a surplus remains
in the hands of the assignee, he holds it in trust for the bankrupt;
and on a proper application to the court of bankruptcy, payment,
or a transfer of it, will be decreed. Until the decree is obtained,
the title remains in the assignee, and if the surplus consists of
rights of action, he alone can maintain suits founded on them."
Robinson v. Denny, supra.

"Although a debtor in his assignment in bankruptcy fails to
include a tract of land which he owns, yet the deed from the regis-
ter to the assignee, including all of the debtor's estate of every de-
scription, will include the omitted land; and, although the assignee
fails to assert title to it, the debtor cannot, after receiving his dis-
charge, maintain suit to recover it from one who claims adversely,
notwithstanding he may have received his discharge more than two
years before, and notwithstanding Rev. St. U. S., sec. 5120 provides
that no attack shall be made on a discharge save within two years,

and sec. 5057 bars an assignee from asserting a claim to the land after two years. The fact that the assignee is barred from asserting title does not reinvest the bankrupt with title." Malone v. Martin, supra.

"One who has been adjudged a bankrupt cannot afterwards recover a tract of land, not exempt property, upon the strength
68 of a title held by him at the time of the adjudication of his bankruptcy, as such title must have passed to the assignee, unless he has been subsequently reinvested with the title, or there be circumstances to raise the presumption of his right to assert the same." Syl. Atwood v. Thomas, supra.

"The title of the assignee is, for the purpose of the trust, an absolute one. The divestiture of the bankrupt is complete, but upon the termination of the trust the law restores to him so much of the property as remains undisposed of. Unless the bankrupt show that he was not in truth insolvent, but that his debts were paid in full through the property surrendered by him, he has no interest sufficient to support his application to set aside such prior sales. As all his debts are absolutely extinguished, so his interest in property thus sold is gone." Vanslyke v. Shryer, supra.

The cases above cited also hold that the title to the bankrupt's property does not revert to him unless there is a surplus after all debts are paid. The mere fact that the trustee has not disposed of it does not help the bankrupt so long as creditors are not paid. The record shows that 70% of Hagener's personal debts and 96 4-10% of his firm debts were unpaid when this quitclaim was made and when this suit was commenced. There is no authority or reason for holding a reverter of any title or interest at that time.

We respectfully submit that the decision announced in the 5th paragraph of the syllabus in this case, to the effect that a
69 bankrupt "retains an interest in the property" after the appointment of a trustee, which is more than a possibility of reverter, is erroneous, as is, also, the statement of law made in the 6th paragraph. As precedents for future decisions in this state, such statements of the law would stand in direct conflict with the decisions of other courts, and without the support, so far as our search has revealed, of a single case involving similar facts. Hence, we ask a rehearing, not merely because of the effect of such decision upon the appellants, but because we believe it marks a departure from former well considered cases in this court and cannot be adhered to when the question is again fully argued and presented, as it may be, in future cases.

Respectfully submitted,

J. P. NOBLE,
L. H. WILDER,
T. F. GARVER,
R. D. GARVER,
Attorneys for Appellants.

70 Be it further remembered, that on the 9th day of July 1910, the same being one of the regular judicial days of the

July Term, 1910, of the Supreme Court of the State of Kansas, in session at the supreme court room in the city of Topeka, the following proceeding among others was had and remains of record in words and figures as follows, to-wit:

71 *Journal Entry Allowing Petition for a Rehearing.*

Journal "OO."

Supreme Court, State of Kansas, July Session, July Term, 1910

SATURDAY, *July 9th*, 1910.

No. 16462.

FRED ROBERTSON et al., Appellees,
vs.
C. F. HOWARD, Appellant.

No. 16463.

FRED ROBERTSON et al., Appellees,
vs.
FRED HOWARD, Appellant.

Now comes on for decision the petition for a rehearing of this cause; and thereupon, it is ordered that said petition be allowed, and that this cause be assigned for a rehearing at the November 1910 session of this court.

72 Be it further remembered, that on the 1st day of November 1910, the same being one of the regular judicial days of the July Term, 1910, of the Supreme Court of the state of Kansas, in session at the supreme court room in the city of Topeka, the following proceeding among others was had and remains of record in words and figures as follows, to-wit:

73 *Journal Entry of Submission on Rehearing.*

Journal "OO."

Supreme Court, State of Kansas, November Session, July Term, 1910.

TUESDAY, *November 1st*, 1910.

No. 16462.

FRED ROBERTSON et al., Appellees,
vs.
C. F. HOWARD, Appellant.

No. 16463.

FRED ROBERTSON et al., Appellees,
vs.
FRED HOWARD, Appellant.

A petition for a rehearing having heretofore been allowed, this cause come on to be heard on the petition in error and transcript of the record of the district court of Rawlins county; thereupon, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

74 Be it further remembered, that on the 10th day of December 1910, the same being one of the regular judicial days of the July Term, 1910, of the supreme court of the state of Kansas, in session at the supreme court room in the city of Topeka, the following proceeding among others was had and remains of record in words and figures as follows, to-wit:

75 *Journal Entry of Judgment on Rehearing.*

Journal "OO."

Supreme Court, State of Kansas, December Session, July Term, 1910.

SATURDAY, *December 10th*, 1910.

No. 16462.

FRED ROBERTSON et al., Appellees,
vs.
C. F. HOWARD, Appellant.

No. 16463.

FRED ROBERTSON et al., Appellees,
vs.
FRED HOWARD, Appellant.

This cause comes on for re-decision; and thereupon, it is ordered and adjudged that the judgment of affirmance heretofore rendered

be vacated and set aside and that the judgment of the court below be Reversed, and that this cause be Remanded with directions to render judgment in favor of the appellants. It is further ordered that the appellees pay the costs of this case in this court taxed at $—, and hereof let execution issue.

76 Be it further remembered, that on the same day to-wit: the 10th day of December, 1910, there was filed in the office of the clerk of the supreme court of the state of Kansas, the court's syllabus and opinion, in the above entitled case, which syllabus and opinion are in the words and figures, as follows, to-wit:

77 No. 16462.

FRED ROBERTSON and W. J. RATCLIFF, Appellees,
v.
C. F. HOWARD, Appellant,

and

No. 16463.

FRED ROBERTSON and W. J. RATCLIFF, Appellees,
v.
FRED HOWARD, Appellant.

Appeal from Rawlins County. Reversed.

On Rehearing.

Syllabus by the Court.

SMITH, *J.:*

1. Except as to the computation of interest and some other exceptional cases, the rights of the parties on a trial, in the absence of supplemental pleadings, are fixed as of the time of the commencement of the action.

2. As between two parties neither of whom has a right to the possession of real estate, of which one is in possession, the other cannot oust him therefrom.

All the justices concurring.

A true copy.
Attest:

____ ____,
Clerk Supreme Court.

78 No. 16462, No. 16463.

The opinion of the court was delivered by

SMITH, *J.*:

To the opinion filed on the former hearing of these cases (82 Kan. 588) is appended a copy of the findings of fact and conclusions of law of the court below. The time of the commencement of the actions with reference to the discharge of the trustee in bankruptcy and the discharge of the bankrupt from his debts was not called to the attention of the court, and was overlooked in the decision. This fact seems to be a very important; indeed determinative of the case.

A transfer of the certificates was attempted to be made by Henry Trauman, the purchaser of the certificates at the trustee's sale, on July 19, 1905. This sale was held to be invalid, and to convey to Trauman no interest in the real estate in Kansas, hence his attempted assignments of the certificates was invalid and we adhere to that view.

On June 19, 1907, the bankrupt, Hagener, and his wife, executed to one of the appellees a quit-claim deed to the land and an assignment of the certificates and of his rights to the rents and profits. This grantee about the same time assigned a one-half interest therein to his co-appellee.

These actions, to recover possession of the land, were commenced July 12, 1907, while the trustee in the bankruptcy proceedings was in full control of the estate of the bankrupt, including these lands, and continued so to be until November 20, 1907, when he was discharged. On this date the bankrupt, Hagener, was also discharged from all of his debts. A trial was had sometime after the last mentioned date, but no supplemental petitions were filed.

It is said in Reynolds v. Thomas, 28 Kan. 810:

"But the rights of the parties, in the absence of supplemental pleadings, are fixed as of the time of the commencement of the actions." See also 1 A. & E. Enc. of L. & P. 1097, Sec. XLL.

This rule seems especially applicable to this case. In the matter of the computation of interest on a debt sued on, we believe it
79 is the general rule to allow interest in case of recovery to the time of trial. There are probably other exceptional cases where equity would adjust subsequently accruing rights; also where the parties to an action have, without objection, tried out and thereby submitted to the court subsequently accruing claims for adjudication. In this case, however, no reason appears for departing from the general rule.

The U. S. Bankrupt Act of 1898, Section 70, provides, in substance, that the trustee of the estate of a bankrupt, upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except as to property which is exempt. Hence the title and right of possession to this property was in the trustee at the time of the execution of the quit-claim deed and assignment to the appellees.

and also at the time of the beginning of these actions, and the trustee had the power for more than four months thereafter, under the orders of the court, to sell the property and convey the right of possession thereof.

It follows that neither the bankrupt nor the appellees had any right to the possession of the property at the time of the commencement of the actions. If, therefore, the appellees' rights are to be determined, as we hold they should be, upon the facts existing at the time of the commencement of the actions, they were not entitled to recover the possession of the property even against one who had simply the naked possession thereof. As between two parties neither of whom has a right to the possession of real estate, of which one is in possession, the other cannot oust him therefrom.

The proposition of law stated in the fifth paragraph of the syllabus in the former decision is seriously questioned, and, while we are inclined to believe the proposition correct as stated, it can only be so regarded with this limitation, at least, that the grantee of the bankrupt cannot make his acquired right the basis of a cause of action until after the trustee *is* bankruptcy is discharged, the bankrupt is discharged of his debts, and the bankruptcy proceedings are closed. It would be an intolerable interference with the ad-
80 ministration of justice in a bankruptcy court to allow the bankrupt, who had divested himself of the title to his property, to be dickering in a possible reversionary interest in such manner as to embarrass the trustee in selling the property and conveying the right of possession thereto.

It is also contended that Bird v. Philpott, 69 L. J. n. s. Cr. Div. 487 and In re Evelyn, 63 L. J. n. s. Q. B. Div. 658, which were followed in the former decision, were based upon the English bankruptcy Act of 1883 and not upon the common law as in force in this country.

For the reasons stated the judgment of the court below is reversed and the case is remanded with directions to render judgment in favor of the appellants.

All the justices concurring.

A true copy.
Attest:

____ ____,
Clerk Supreme Court.

81 And afterwards, on the 29th day of December, 1910, there was filed in the office of the clerk of the supreme court of the state of Kansas, a petition for a rehearing of this cause, which petition for a rehearing is in the words and figures, as follows, to-wit:

82 Filed Dec. 20, 1910. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 16462.

C. F. HOWARD, Appellant,
vs.
FRED ROBERTSON and W. J. RATCLIFF, Appellees.

No. 16463.

FRED HOWARD, Appellant,
vs.
FRED ROBERTSON and W. J. RATCLIFF, Appellees.

Petition of Fred Robertson and W. J. Ratcliff, Appellees, for Rehearing.

John E. Hessin, Fred Robertson, Attorneys for Petitioners.

83 In the Supreme Court of the State of Kansas.

No. 16462.

C. F. HOWARD, Appellant.
vs.
FRED ROBERTSON and W. J. RATCLIFF, Appellees.

No. 16463.

FRED HOWARD, Appellant,
vs.
FRED ROBERTSON and W. J. RATCLIFF, Appellees.

Petition of Fred Robertson and W. J. Ratcliff, Appellees, for Rehearing.

The above-named appellees respectfully petition the Court to grant a rehearing in the above entitled causes upon the following grounds and for the following reasons:

84

I.

In the decision originally rendered in these cases, 82 Kansas 588, the Court misconstrued the Federal Statutes involved herein and overlooked the Federal decisions construing the same, when it decided, as disclosed in the first paragraph of the syllabus, that,

"The sale by a trustee in bankruptcy, under the orders of a United States District Court in the State of Illinois, of a certificate of sale of state school land in Kansas conveys to the purchaser of such certificate no interest in the land in this state, none of the steps re-

quired by the laws of the United States being taken to sell, within this state, the land as such."

That the decision so announced and indicated was and is in contravention of that portion of section 2 of the Act of Congress of July 1, 1908, entitled:

"An Act to establish a uniform system of bankruptcy throughout the United States,"

by which all courts of bankruptcy were and are authorized to

"(7) Cause the estates of bankrupts to be collected, reduced to money and distributed and determined controversies in relation thereto, except as herein otherwise provided."

Also the fifteenth clause of section 2 of said Act, reading as follows:

"Make such orders, issue such process and enter such judg-
85 ments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act."

Also the following portion of section 47 of said Act.

"Trustees shall respectively (2) collect and reduce to money the property of the estate for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest."

And that portion of section 70 of said Act, reading as follows:

"The trustee of the estate of a bankrupt upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt."

And that portion of said section, reading as follows:

"All real estate and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by and report to the court. Real and personal property shall when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value."

The Court also misconstrued and overlooked the Federal decisions construing section 1 of the Act of Congress of March 3, 1893, which reads as follows:

"That all real estate or any interest in land sold under any
86 order or decrees of any United States Court shall be sold at public sale at the court house of the county or parish or city in which the property, or the greater part thereof, is located, or upon the premises as the court rendering such order or decree of sale may direct."

In the expression found at page 595 thereof when it states as follows:

"The attempted sale of the land by the trustee is not simply irregular and erroneous; it is void."

Also in the further statement beginning on said page as follows:

"The United States District Court for the Southern District of

Illinois has no jurisdiction in Kansas in bankruptcy, and the trustee appointed by it can only sell real estate in this state under orders procured from some court having jurisdiction therein."

II.

In the judgment and decision of this Court, rendered on December 10, 1910, the Court in holding and deciding that a transfer of the certificates in question made to Henry Frauman of the certificates at the trustees' sale July 19, 1905, conveyed nothing for the reason that such sale was invalid, and conveyed nothing to Frauman, overlooked the fact that the sale made to said Henry Frauman by the trustee was made before the petition was filed in the
87 court below in these causes, and misconstrued the Federal statutes hereinbefore quoted and overlooked the Federal decisions construing the same, as will be hereafter shown. The Court similarly misconstrued the Federal statutes above quoted and overlooked the Federal decisions construing the same, when it held and decided in said last mentioned opinion that,

"Hence the title and right of possession to this property was in the trustee at the time of the execution of the quit claim deed and assignment to the appellees, and also at the time of the beginning of these actions, and the trustee had the power for more than four months thereafter under the orders of the court, to sell the property and convey the right of possession thereof. It follows that neither the bankrupt nor the appellees had any right to the possession of the property at the time of the commencement of the action."

III.

It appears from the records herein that the trial court by agreement of parties waived a jury, made findings of fact and conclusions of law, which findings of fact were in favor of these petitioners, and upon which findings of fact the appellants moved the court to grant them judgment; that after the court overruled this motion the appellants then filed a motion for a new trial and the court in both of said decisions of these causes overlooked the fact that
88 the appellants were thereby estopped to question the correctness of said findings of fact and were and should be held to be so estopped under the well-established rule that a party to litigation cannot successfully assume antagonistic positions in the progress of a trial, and cannot in the appellate court assume a position antagonistic to that which was assumed in the court below.

IV.

The misconstruction by the Court of the Federal statutes involved and the overlooking of the Federal decisions correctly construing the same, were and are the efficient cause of petitioner's failure to have the decision of the trial court affirmed herein, for the reason that had the sale of the school land certificates by the trustee in bankruptcy been held valid, the grounds upon which the reversal

of December 10, 1910, was based would have been without effect and could not have been maintained.

V.

These petitioners respectfully show to the Court that the construction of the above named sections of the National Bankruptcy Act and the above quoted section of the Act of Congress of
89 March 3, 1893, are expressly and vitally involved herein, and the construction thereof heretofore given in these causes by this Court is contrary to the binding construction thereto given by the courts of the United States

The petitioners were successful in these causes in the court below, and also successful in this Court until their adversaries succeeded in procuring the reversal of the first decision by this Court, and hence this is the first opportunity your petitioners have had and the first cause they have had to pray for a rehearing; this is also the first time in the stage of these proceedings when the questions hereinbefore suggested were clearly and beyond doubt vital questions in this cause.

It is quite natural that the conclusion may readily be reached that the Act of Congress of March 3, 1893, should be held to cover all sales of all kinds ordered by all Federal courts. But it must be remembered that this was enacted five years before the passage of the Bankruptcy Act, and it is apparent from the face of the latter Act and demonstrated by repeated decisions of the Federal courts, that this is a later and wider enactment sufficient in and of
90 itself, and its terms, and the jurisdiction of the courts therein named are not to be decimated or hampered in any way by the former enactment which manifestly has reference to ordinary judicial sales, aside from those growing out of bankruptcy proceedings. In the case of Granite City Bank, 137 Federal 818, the Court of Appeals of the Eighth Circuit held that:

"An adjudication in bankruptcy operates as a seizure of the bankrupt's property, by which it is taken in custodia legis wherever situated within the United States, and the title and right of possession pass by operation of law to the trustee, as custodian for the court, at once on his selection and qualification. Whether property is within the district or not is immaterial to affect the exclusive right of the court which made the adjudication to direct its sale and to determine all claims thereto, on proper notice to the parties in interest, whether they reside within or without the district; the filing of the petition in bankruptcy itself being a caveat to all the world."

The Court quotes from Chief Justice Fuller in Mueller v. Nugent, 184 U. S. 1, where he said.

"It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction; * * * and on adjudication title to the bankrupt's property became vested in the trustee, * * * with actual or constructive possession, and placed in the custody of the bankruptcy court."

91 The Circuit Court thereupon says:

"In short the adjudication operates as a seizure of the property of the bankrupt, by which it is taken in custodia legis * * * no matter where the property of the bankrupt's estate may have its situs, if within the United States, it passes to and vests in the trustee * * * As to the property without the domain of the National Act, section 7, subsection 5, requires the bankrupt to execute transfers thereof to the trustee in bankruptcy."

In the opinion the Court further says:

"Under the scheme of the Bankrupt Act, the District Court of the domicile of the bankrupt takes exclusive jurisdiction of the bankrupt and his property, wherever situated, to administer it and distribute the proceeds pari passu among the creditors according to their respective rights and priorities. Only one court—the court making the adjudication—collects, marshals, administers, determines priorities of the parties, and directs the distribution of the assets. There are no such things in bankruptcy proceedings as courts of primary and ancillary jurisdiction."

In closing the opinion the Court said:

"The trustee was authorized to sell the property on the premises in South Dakota, or drive it away, as the court might direct."

And it will be remembered that the court was the District Court of the United States for the Northern District of Iowa.

In the case of Dempster, 172 Fed. 353, it is held by the
92 Eighth Circuit Court of Appeals, that the validity of an adjudication of bankruptcy cannot be collaterally attacked by a creditor in a court of another jurisdiction; that the jurisdiction of the court which makes an adjudication extends to all property of the bankrupt situated anywhere in the United States, and it may make such orders with respect thereto as are necessary for the preservation, collection, and administration of such property. In the opinion the Court said, page 255:

"The court in which the petition is filed has plenary jurisdiction in bankruptcy throughout the United States. Within that limit all the estate within the possession of the bankrupt or held by another as his property is brought immediately within the custody of the court and made subject to its protection. The filing of the petition is an attachment of the estate, and an injunction restraining any act which will interfere with its administration in bankruptcy. This jurisdiction is national, and takes no account of districts or states." Citing In re Wood and Henderson, 210 U. S. 246, and other authorities.

In the case of Edes, 135 Fed. 595, the United States Court for the District of Maine decided that the Act of March 3, 1893, has no application whatever to bankruptcy proceedings. That the Bankruptcy Act confers upon United States Courts full equitable powers in the administration of estates, and they may, for good cause shown, order either real or personal property sold at private sale. In
93 this case the referee had dismissed a petition for authority to sell a portion of a bankrupt's estate, to-wit, certain parcels of real estate situated in certain towns at private sale, on the ground that

the Act in question required such sales to be made upon due notice, etc., but the Court held that the evident intention of Congress in passing the Bankruptcy Law of 1898 was to provide an ample and complete method of administering and disposing of the assets of bankrupts, and said:

"The court created by this law was given jurisdiction which is in the broadest sense equitable. * * * Under the general rules of construction, it must be held that, if Congress had intended to limit the sales of property under the bankrupt law to the provisions of the Act of 1893, it would have said so in clear terms. The only limitation imposed by the bankruptcy statute is that such sales must be 'subject to the approval of the court.' * * * The bankrupt law is the last expression of the legislative will upon the subject. It clearly does not intend to limit the method of sales of property by the provisions of the Act of 1893. If it did, referees and trustees would be very much limited and harassed in their disposition of property—particularly in the disposition of perishable property—and the purpose of the law would be in a large degree defeated. A new statute which affirmatively grants a larger jurisdiction or power or right is held to prevail over any prior statute by which a limited power or jurisdiction or right, less ample has been granted. * * * It must be held that the bankrupt law, in ordering sales, is not limited by the Act of March, 1893."

94 Then, after quoting General Order No. 18, the court further says:

"While this general order has no force as legislation, and while it is not even a judicial interpretation of the statute, it is an order of the Supreme Court of the United States, based upon the bankruptcy statute. It cannot be held to be in derogation of such statute. Under its provisions a perishable estate may be sold, even without notice to the creditors, and the courts have been very liberal in their construction of what is 'perishable.' The Federal courts have in fact liberally interpreted the whole statute, as giving full equitable powers to the court."

And just before the close of the opinion this language is found:

"There can be no question but that a bankruptcy court, under the broad powers given by the bankrupt law, may order a sale of either real or personal property at private sale."

We understand it to be the province of the Federal courts primarily to construe National legislation, as it is the province of state courts to construe state legislation, and we think there can be no doubt in view of these authorities, that the school land certificates in question, whether they be considered chattels real or real estate or personal property, could have been lawfully sold by the trustee in bankruptcy, and therefore these petitioners by virtue of

95 said sale and subsequent assignments showed good title to the premises in question, and were and are entitled to the possession thereof.

We respectfully urge these questions, not only in fairness to the petitioners, but in fairness to the Court, deeming it more in accordance with proper practice and due respect for his tribunal to call

attention as clearly as possible to these questions at this time, instead of proceeding now to sue out a writ of error to the Supreme Court of the United States.

A question of practice is also involved and has not been decided. The abstract, page 31, shows that after the findings of fact and conclusions of law were filed the defendant moved for judgment in his favor on the findings, which motion was overruled by the court, and that—

"Thereupon on the same day defendant filed his motion for a new trial, setting up all the statutory grounds therefor, among them being that the decision of the court was not sustained by sufficient evidence, and that it was contrary to law."

This shows clearly that the defendants first elected to stand on the findings of fact as sufficient to warrant a judgment in their favor, and requested the court to so hold; and having failed in said request and not until after having so failed, they then attacked the findings of fact by motion for new trial. It would seem quite clear
95½ that this amounted to assuming inconsistent attitudes in the progress of the trial, and that having deliberately chosen to approve the findings of fact and ask a judgment thereon they cannot be heard now to attack such findings. In the 14th volume of the A. & E. Cyc. of P. & P., page 900, the rule is laid down that—

"The right (to a motion for a new trial) is also waived by pursuing other proceedings inconsistent with the motion, as by * * * demurring to the evidence."

In the foot note the rule is laid down that by demurrer to the evidence a party admits all facts which the evidence tends to prove, and such party waives the right to raise the same question by a motion for a new trial, citing Ruddell v. Tyner, 87 Fed. 529, and Stockwell v. State, 101 Ind. 1.

In Christy v. Barnes, 33 Kas. 317, it is held that a demurrer to evidence admits every fact and conclusion which the evidence most favorable to the other party tends to prove.

In Watkins v. Bank, 51 Kas. 260, the Court, in speaking of one who had retained dividends and thereby recognized the validity of the liquidation of certain matters, said:

"He cannot be permitted to occupy the inconsistent position of repudiating the liquidation and at the same time accepting the fruits of it."

95¾ The rule contended for is similar to the familiar rule of the election of remedies upheld in Plow Company v. Rogers, 53 Kas. 743.

In Luse v. Railway, 57 Kas. 361, this Court, at page 366, said:

"We all agree that a defendant may file a motion for a favorable judgment on the findings, and a motion for a new trial at the same time."

The Court also said:

"A party should not be permitted to rely in one breath upon findings of fact as true, and, obtaining a favorable ending of the case on that assumption, in the next, challenge them as false and be allowed an exception when the court adheres to the former ruling in

favor of the defendant by refusing to set it aside on such motion for a new trial. * * * A court ought not to allow a party the benefit of two inconsistent and contradictory positions in the same law suit."

It seems from this opinion that the members of the Court as then constituted did not hold similar views touching the questions involved. Suffice it to say that in the case now under consideration the motions were not filed at the same time, but the defendants first elected to approve the findings of fact and accept them as correct, and asked a judgment thereon, and then after finding that the court did not see fit to give them such judgment then sought to elect to assume the opposite position and attack the same findings on
96 which they had previously asked a judgment in their favor.

In Railroad v. Holland, 58 Kas. 317, the Court said, at page 320:

"The pendency of a motion for judgment on the findings affords no excuse for a delay in filing a motion for new trial more than three days after the rendition of the verdict * * * We think the two motions may be pending at the same time, and that the motion for a new trial is not waived by a motion for judgment on the special findings notwithstanding the general verdict."

(Citing Luse v. Railway, supra.)

But this does not reach the point of deciding whether or not a party may first approve the findings and ask a judgment thereon in his favor, and after an adverse ruling may then change front and attack the findings by motion for a new trial. In Board of Education v. Clark, 64 Kas. 430, this Court again announced the rule that

"A party litigant must not assume inconsistent positions in the litigation."

At page 434 the following quotation is found from Elliott on Appellate Procedure, section 496:

"The rule under discussion is no more than an application of the familiar doctrine of election, which has its foundation in the old adage that a man cannot blow both hot and cold, and hence there is nothing novel in it."

We also call attention again to Aultman v. Knoll, 71 Kas.
97 109, where this Court held that if a party accepts the special finding of a jury as established facts in a case, the court will not consider objections raised to the admissibility of testimony based on the assertion of the non-existence of such facts. In short, it is a question still undetermined by this Court whether or not a party litigant in the progress of a trial may at one time accept the findings of fact and request judgment thereon in the most solemn manner, and then after finding his request refused and having blown hot may be permitted to turn round and blow cold by attacking these very same findings. Our attention has not been called to any decision of any court permitting this to be done. If it cannot be done then these petitioners have been wrongfully deprived of the benefit of this rule and are entitled to its enunciation in their behalf. If it

can be done and successfully done, the profession ought to be made aware of it by a binding decision of this Court.

Respectfully submitted,

JOHN E. HESSIN,
FRED ROBERTSON,
Attorneys for Petitioners.

98 Be it further remembered, that afterwards, on the 2nd day of February, 1911, the same being one of the regular judicial days of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding, among others, was had and remains of record, in the words and figures, as follows, to-wit:

99 *Journal Entry Denying 2nd Petition for Rehearing.*

Journal "PP."

Supreme Court, State of Kansas, February Session, January Term, 1911.

THURSDAY, *Feb. 2nd*, 1911.

No. 16462.

FRED ROBERTSON et al., Appellees,
vs.
C. F. HOWARD, Appellant.

No. 16463.

FRED ROBERTSON et al., Appellees,
vs.
FRED HOWARD, Appellant.

Now comes on for decision the petition for a rehearing of this cause; and thereupon, it is ordered that said petition for a rehearing be denied.

100 In the Supreme Court of the State of Kansas.

No. 16462.

FRED ROBERTSON et al., Appellees,
v.
C. F. HOWARD, Appellant.

No. 16463.

FRED ROBERTSON et al., Appellees,
v.
FRED HOWARD, Appellant.

I, D. A. Valentine, clerk of the supreme court of the state of Kansas, do hereby certify that the above and foregoing is a true, full, complete and correct transcript of the record and proceedings in the above entitled case and also of the opinions of the court rendered therein, as the same remain of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, Kansas, this 18th day of May A. D. 1911.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

101 Here follows, the original petition for a writ of error and Assignments of error, and the order allowing the same, a copy of the Bond on Appeal, the original Writ of Error, and the original citation together with the acknowledgement of service, thereof.

102 Filed Mar. 8, 1911. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the United States.

FRED ROBERTSON and W. J. RATCLIFF, Plaintiffs in Error,
vs.
C. F. HOWARD, Defendant in Error.

Fred Robertson and W. J. Ratcliff respectfully show that on the 10th day of December, 1910, the Supreme Court of the State of Kansas rendered a judgment against your petitioners in a certain consolidated action, being causes numbered 16,462 and 16,463, then pending in said Court, wherein C. F. Howard was appellant and your petitioners were appellees; that in said judgment there was presented for adjudication by said Court a Federal question as to the force and effect of the sale, by a Trustee in Bankruptcy of bankruptcy proceedings pending in the State of Illinois, of real estate

located in the State of Kansas, which Federal question is fully presented upon the record thereof, and which was decided by said Supreme Court of Kansas against the contention of your petitioners.

A full statement of said contention as made, and the errors committed by said Supreme Court of Kansas are contained in the assignment of errors filed herewith by your petitioners.

Your petitioners therefore present herewith an exemplified transcript of the record of said Supreme Court of Kansas in said
103 cause, and pray that a writ of error to said Supreme Court be allowed; that said citation be granted and signed; that the bond herewith presented be approved; that the same may operate as a supersedeas; that the judgment of the said Supreme Court of Kansas be reviewed in the Supreme Court of the United States and the judgment of said Supreme Court of Kansas be reversed and set aside.

Assignment of Errors.

I.

The Supreme Court of the State of Kansas erred in holding in its decision rendered on the 11th day of June, 1910, in which decision the judgment of the District Court of Rawlins County, State of Kansas, was affirmed, that the United States District Court for the Southern District of Illinois had no jurisdiction in Kansas in bankruptcy, and that a Trustee appointed by it could not sell real estate in Kansas under orders issuing from said Bankruptcy Court in the State of Illinois; that a sale so made by the Trustee in pursuance of an order of the United States District Court for the Southern District of Illinois, of land located in the State of Kansas, conveyed to the purchaser no interest to such land and the sale made by such trustee was void.

II.

The Supreme Court of the State of Kansas erred in its decision on the application for a rehearing of said cause, rendered on the 10th day of December 1910 in adhering to its judgment and decision, holding that the sale made by the Trustee in Bankruptcy in pursuance of the orders of the United States District Court in Bank-
ruptcy for the Southern District of Illinois, was invalid and
104 conveyed no interest to the purchaser to real estate located in the State of Kansas, and in which opinion and judgment the Supreme Court of the State of Kansas reversed the District Court of Rawlins County, Kansas and remanded said cause with directions to render a judgment in favor of said defendant in error.

Wherefore, your petitioners respectfully pray that a writ of error be issued out of this Court directed to the Supreme Court of the State of Kansas, commanding said Court to serve and send to this Court a full and complete transcript of the records of all proceedings of said Supreme Court of the State of Kansas in said consolidated cause, wherein your petitioners were appellees and the said C. F. Howard,

was appellant, and that your petitioners may have such other and further relief and remedy in the premises as to this Court may seem appropriate, and that said judgment of the Supreme Court of the State of Kansas in said case, and every part thereof may be reversed by this Honorable Court.

And your petitioners will ever pray.

FRED ROBERTSON &
W. J. RATCLIFF,
By CHAS. BLOOD SMITH,
Their Attorney.

105 [Endorsed:] No. 16462-3. Fred Robertson et al., Pl's in Error, vs. C. F. Howard, Def't in Error. Petition for writ of error and assignments. Filed Mar. 8, 1911. D. A. Valentine, Clerk Supreme Court. Rossington & Smith, Rooms No. 23, 24, 25 and 26 Crawford Building, Topeka, Kansas.

106 In the Supreme Court of the State of Kansas.

No. 16462.

C. F. HOWARD, Appellant,
vs.
FRED ROBERTSON and W. J. RATCLIFF, Appellees.

No. 16463.

C. F. HOWARD, Appellant,
vs.
FRED ROBERTSON and W. J. RATCLIFF, Appellees.

Upon consideration of the petition of Fred Robertson and W. J. Ratcliff, the appellees in the above entitled cause, the Court does allow the writ of error prayed for therein, upon the said appellees giving bond according to law in the sum of one thousand dollars ($1000.00).

W. A. JOHNSTON,
Chief Justice.

[Endorsed:] 16462. C. F. Howard vs. Fred Robertson et al. and 16463 C. F. Howard vs. Fred Robertson et al. Order allowing Writ of Error. Filed Mar. 8 1911. D. A. Valentine, Clerk Supreme Court.

107 In the Supreme Court of the State of Kansas.

No. 16462.

FRED ROBERTSON and W J. RATCLIFF, Appellees,
v.
C. F. HOWARD, Appellant.

No. 16463.

FRED ROBERTSON and W. J. RATCLIFF, Appellees,
v.
C. F. HOWARD, Appellant.

Know all men by these presents, That we, Fred Robertson and W. J. Ratcliff, as principals, and Geo. H. Hodges, as surety, are held and firmly bound unto C. F. Howard in the sum of One thousand dollars, to which payment well and truly to be made we bind ourselves, jointly and severally, and all and each of our heirs, successors, executors and administrators, firmly by these presents.

Sealed with our seal this 8th day of March, 1911.

Whereas, the above named Fred Robertson and W. J. Ratcliff have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the Supreme Court of the State of Kansas rendered in the above consolidated action,

Now therefore, the condition of this obligation is such that if the above named Fred Robertson and W. J. Ratcliff shall prosecute their said writ of error to effect, and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void: otherwise to remain in full force and effect.

FRED ROBERTSON,
W. J. RATCLIFF,
By CHAS. BLOOD SMITH, *His Att'y.*
GEO. H. HODGES.

Approved:

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Endorsed: 16462–16463. C. F. Howard v. Fred Robertson et al. Bond. Filed March 9th, 1911. D. A. Valentine, Clerk Supreme Court. Rossington and Smith, Attorneys for —.

108 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Kansas, before you, being the highest court of law and equity in

said State in which a decision can be had in said suit or proceeding wherein C. F. Howard was appellant and Fred Robertson and W. J. Ratcliff were appellees, wherein a title, right, privilege and immunity were and are claimed under the Constitution and Statutes of the United States, and the decision was against the title, right, privilege and immunity claimed thereunder a manifest error hath happened, to the great damage of the said Fred Robertson and W. J. Ratcliff as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at Washington, on or before the — day of —, 1911, next in Supreme Court to be then and there held to the end that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 16th day of May in the year of our Lord one thousand nine hundred and eleven.

Issued at office in the City of Topeka with the seal of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT,
Clerk Circuit Court United States, First Division of the Judicial District of Kansas.

Allowed by
W. A. JOHNSTON,
Chief Justice.

109 *Return to Writ.*

UNITED STATES OF AMERICA,
First Division of the Judicial District of Kansas, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Circuit Court, at office in the City of Topeka this — day of ——, A. D. 190–.

——— ———,
Clerk of said Court.

[Endorsed:] No. —. United States Circuit Court, First Division of the Judicial District of Kansas. Fred Robertson et al., pl'ffs in error, vs. C. F. Howard, def't in error. Writ of Error to the Supreme Court of Kansas. Filed May 18 1911. D. A. Valentine, Clerk Supreme Court.

110 THE UNITED STATES OF AMERICA:

To Fred Howard, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at Washington, D. C., within thirty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of Kansas, wherein Fred Robertson and W. J. Ratcliff are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, this 16th day of May in the year of our Lord one thousand nine hundred and eleven.

[Seal Supreme Court, State of Kansas.]

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

Attest:

D. A. VALENTINE,
Clerk of Supreme Court.

111 I hereby accept service of the within citation this 16th day of May, 1911.

T. F. GARVER,
Attorney for Fred Howard.

[Endorsed:] No. —. United States Circuit Court, First Division of the Judicial District of Kansas. Fred Robertson et al., pl'ffs in error, vs. C. F. Howard, def't in error. Citation. Filed May 18 1911. D. A. Valentine, Clerk Supreme Court.

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Supreme Court.

STATE OF KANSAS, *ss:*

I, D. A. Valentine, clerk of the supreme court of the state of Kansas, do hereby certify that there was lodged with me as such clerk on May 17th, 1911, in the matter of Robertson et al. v. Howard et al.:—

1. The original bond of which a copy is herein set forth.
2. 3 copies of the writ of error, as herein set forth, two for the defendants and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 18th day of May, 1911.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of Supreme Court of Kansas.

113 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete records and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Kansas, at my office in the City of Topeka, this 18th day of May, 1911.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of Supreme Court of Kansas.

Endorsed on cover: File No. 22,727. Kansas Supreme Court. Term No. 320. Fred Robertson and W. J. Ratcliff, plaintiffs in error, vs. C. F. Howard and Fred Howard. Filed June 8, 1911. File No. 22,727.

11

No. 320

In the Supreme Court
of the United States.

FRED ROBERTSON AND W. J. RATCLIFF,
Plaintiffs in Error,
vs.
C. F. HOWARD AND FRED HOWARD,
Defendants in Error.
No. 22,727.

ON WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

CHAS. BLOOD SMITH,
SAMUEL BARNUM,
Attorneys for Plaintiffs in Error.

CRANE & CO., TOPEKA

SUBJECT INDEX.

The jurisdiction of the Bankruptcy Court to administer the property of the bankrupt extends through the United States. (Pp. 10–29.)

The jurisdiction of the Bankrupt Court with reference to the administration of the property of the bankrupt is not limited by the Act of March 3, 1893, known as Chapter 225, 27 Stat. 751 (U. S. Compiled Statutes 1901, p. 710), pp. 19–23.

The authorities cited in the opinion rendered by the Kansas Supreme Court do not support the conclusion therein stated, as to the jurisdiction of the Bankruptcy Court. (Pp. 26, 27.)

Appraisement of property of the bankrupt not a condition precedent to a valid sale thereof. (Pp.26–29.)

A sale of real property after a confirmation thereof is not subject to collateral attack for any irregularity in appraisement or description. (Pp. 29–32.)

CASE INDEX.

In the Supreme Court
of the United States.

FRED ROBERTSON AND W. J. RATCLIFF,
Plaintiffs in Error,
vs.
C. F. HOWARD AND FRED HOWARD,
Defendants in Error.
No. 22,727.

ON WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

THE plaintiffs in error filed two ejectment suits covering separate quarters of school lands situated in Rawlins county, Kansas, against the two defendants in error. These two actions were tried on the same evidence, and judgments rendered in favor of the plaintiffs by the District Court of Rawlins county, Kansas. Thereupon the defendants appealed to the Supreme Court of the State of Kansas, where the two cases were consolidated. (R., p. 23.)

The record discloses that the quarter-sections of land, being the southeast and southwest quarters of Section 16, Township 1, Range 34, Rawlins county, Kansas, were sold on December 23, 1884, to one A. B. Thomas, and certificates of sale issued in accordance with the provisions of the laws of Kansas providing for the purchase and sale of school lands. By subsequent assignments these two certificates became the property of John Hagener, and were held by him at the time of the filing by said Hagener of a voluntary petition in bankruptcy in the District Court of the United States for the Southern District of Illinois. This petition was filed October 7, 1902, and the petitioner duly adjudged a bankrupt on November 4, 1902.

The evidence on behalf of the plaintiffs showed a petition by the Trustee in bankruptcy for an order to sell the property of the bankrupt, and an order made by the Referee on September 24th, 1904, for such sale upon ten days' notice to the creditors. (Record, pp. 6, 7.) The publication notice provided for a sale (among other property) of the certificates of purchase covering the two quarter-sections involved, except that through error the range was given as range 1 instead of 34.

The record further shows that on April 18, 1906, the Trustee filed a report of the sale, which report was

approved and confirmed by the Referee on April 19, 1906. The record introduced in evidence in the trial court did not affirmatively show that any appraisement was made either of the certificates or the interest of the bankrupt in the land as evidenced by them.

The trial court found that the Trustee by virtue of the sale and approval assigned and delivered the certificates to the purchaser (Finding No. 9; Record, p. 27), who thereupon conveyed to the plaintiff in error, Fred Robertson. (Finding No. 10; Record, p. 28.) The evidence further showed the issuance by the Supreme Court of Kansas of a peremptory writ of mandamus to the County Treasurer of Rawlins county to accept the tender of the plaintiffs in payment of the balance due on the purchase-price of the two quarter-sections of school land, and further proved the payment to the said County Treasurer by plaintiffs of the balance due the State of Kansas under these certificates. (Findings Nos. 14, 15; Record, p. 28.) Upon said payments being made, the State of Kansas issued to the plaintiffs in error a patent for said land (R., p. 13.)

On June 19, 1907, the bankrupt and his wife quitclaimed to plaintiffs all their right and title to the tracts in controversy. The evidence upon behalf of the plaintiffs further showed that the defendants were

in possession at the commencement of the action, July 12, 1907, and also proved the value of the rents and profits thereof for the years 1905, 1906, and 1907.

Hagener, the bankrupt, received his discharge on November 20, 1907, on which date the Trustee was likewise discharged and the estate closed.

The plaintiffs therefore claim title to the land in controversy through two sources: First, through the sale by the Trustee in Bankruptcy of the two certificates of purchase; and second, through quitclaim deeds from the bankrupt and his wife.

The defendants below claimed under tax-sale certificates and renewal certificates of purchase of school land which were held by the trial court to be void. The trial court found that the plaintiffs Robertson and Howard were the owners of the land, entered judgment accordingly, and also for rents and profits. (R., pp. 21, 22.)

Upon the case being appealed by defendants to the Supreme Court of the State, that court held, in the original opinion handed down, that the United States District Court for the Southern District of Illinois sit ting in bankruptcy had no jurisdiction over the land situated in Kansas; and further, that by reason of the provisions of the Act of March 3rd, 1893, Chap. 225, §1, 27 Statutes, 751 (U. S. Comp. Statutes, 1901, p.

710) requiring judicial sales to be made at the courthouse in the county in which the land is situated, the sale in Illinois by the Trustee in Bankruptcy in that district of lands located in Kansas was void and conveyed no title to the purchaser. The judgment of the trial court was first affirmed, however, upon the ground that the bankrupt having assigned and quitclaimed his interest in the property, the appellees in the Supreme Court by the conveyance of the bankrupt's interest obtained a fee-simple title to the land. (R., pp. 30–32.)

Thereafter the court granted a rehearing upon the petition of the defendants in error (R., p. 32), and afterwards upon argument the judgment of affirmance theretofore rendered was vacated and set aside, and the judgment of the trial court reversed, with directions to the trial court to render judgment for the defendants in error. (R., pp. 41, 42.)

The Supreme Court of the State in its last decision still adhered to the view that the sale by the Court of Bankruptcy in Illinois was invalid and conveyed to the purchaser no interest in the real estate located in Kansas (R., p. 43), and reversed the trial court and directed judgment to be entered for the defendants in error upon the ground that the actions in ejectment were commenced while the bankruptcy proceedings were still pending, and that the quitclaim and assign-

ments of the bankrupt to the plaintiffs in error could not operate at that time to convey any title, inasmuch as the bankrupt had not obtained his discharge, and that the trial was had without filing a supplemental petition. (R., p. 43.)

Thereupon the appellees (plaintiffs in error here) filed their petition for a rehearing, asserting that the Supreme Court of Kansas had misconstrued the Federal statutes referred to, and that its decision was in contravention of the Acts of Congress, as appears by their petition for a rehearing. (R., p. 45.)

Their petition for a rehearing was denied, and a writ of error was sued out from this court.

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of the State of Kansas erred in holding, in its decision rendered on the 11th day of June, 1910,—in which decision the judgment of the District Court of Rawlins County, State of Kansas, was affirmed,—that the United States District Court for the Southern District of Illinois had no jurisdiction in Kansas in bankruptcy, and that a Trustee appointed by it could not sell real estate in Kansas under orders issuing from said Bankruptcy Court in the State of Illinois; that a sale so made by the Trustee in pursuance of an order of the United States District Court for the Southern District of Illinois, of land located in the State of Kansas, conveyed to the purchaser no interest to such land and the sale made by such Trustee was void.

II.

The Supreme Court of the State of Kansas erred in its decision on the application for a rehearing of said cause, rendered on the 10th day of December, 1910, in adhering to its judgment and decision, hold-

ing that the sale made by the Trustee in Bankruptcy in pursuance of the orders of the United States District Court in Bankruptcy for the Southern District of Illinois, was invalid and conveyed no interest to the purchaser to real estate located in the State of Kansas, and in which opinion and judgment the Supreme Court of the State of Kansas reversed the District Court of Rawlins county, Kansas, and remanded said cause with directions to render a judgment in favor of said defendant in error.

ARGUMENT.

The sole question involved in this proceeding, is the effect of a sale made within the State of Illinois by the Bankruptcy Court for the Southern District of that State of all the right and interest of the bankrupt, as evidenced by school-land certificates, to certain sections of land situated within the State of Kansas.

The record in this case with reference to this sale shows: That the Trustee in Bankruptcy duly petitioned for an order of sale, and that such order of sale was made after ten days' notice. (R., pp. 6, 7.) That on November 12, 1904, the real estate in question was sold to one Henry Fraumann (R., p. 8), and thereafter, and on April 19, 1906, the sale was duly approved and confirmed by the Referee in Bankruptcy. (R., pp. 9, 10.)

The plaintiffs in error claim under the purchaser at the sale in bankruptcy. The defendants in error had no title to the land other than by bare possession thereof, the tax deeds and certificates under which they held being admittedly void. The attack upon the position of plaintiffs in error is aimed at the title

which Fraumann, their grantor, obtained from the Trustee in Bankruptcy. The validity of the sale made by the Trustee was questioned in the State court upon three grounds. It was urged first, that the certified copy of the proceedings of the bankruptcy court failed to show an appraisement of the real estate; and further, that the record disclosed that the publication notice of the sale of the certificates contained a misdescription of the land. It was finally contended that a sale by a bankruptcy court of Illinois within that State of land of the bankrupt located in Kansas did not convey to the purchaser the interest of the bankrupt therein. This last proposition was upheld, as has been stated, by the Kansas Supreme Court, resulting in an order reversing the judgment entered by the trial court.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SITTING IN BANKRUPTCY, HAD JURISDICTION TO ORDER A SALE WITHIN THE STATE OF ILLINOIS, OF LANDS SITUATE IN KANSAS.

This in our judgment is the sole question raised in this proceeding. It is contended by the defendants in error, first, that the Illinois court had no jurisdiction in the way of power to order a sale of the Kansas land; and further, that by reason of the provisions of the Act of Congress approved March 3, 1893,

with reference to judicial sales, no valid sale of the Kansas land could have been made in Illinois. The first contention of defendants in error amounts to the position that the Bankruptcy Court is confined in its administration of the property of the bankrupt to State or district boundaries. It will follow therefrom that whenever the bankrupt has property in two or more States it will be necessary to commence independent or ancillary proceedings in such States in order to subject the property therein to administration and subsequent sale thereunder.

It is submitted that such is not the law or the intent of Congress as disclosed by the scheme of bankruptcy law provided for in the Act of 1898.

The adjudication of the bankrupt duly made and the appointment of the Trustee gives under the provisions of the Act to the bankruptcy court and the trustee jurisdiction and title of the property of the bankrupt wherever located in the United States. Having obtained such jurisdiction, the court in which the proceeding is pending has necessarily, under the plenary power conferred upon it by section 2, subdiv. 7 of the Act of 1898, full jurisdiction to obtain possession of and to convert into money by any summary proceeding, property of the bankrupt, real or personal, wherever situate. The only possible exception to the

last-mentioned proposition is in the instance where such property is in the hands of a party who holds the same in good faith adversely to the bankrupt or Trustee.

The facts in the case at bar clearly do not bring it within the exception stated. Our position that the Bankruptcy Court in Illinois acquired jurisdiction to make an order of sale of the lands in Kansas in controversy herein will, we believe, be found to be amply supported by the authorities, to which we will now call the Court's attention.

This court in the case of *Mueller v. Nugent*, 184 U. S. 1, considering the question of the jurisdiction of the bankruptcy court and its right to proceed in the collection of the property of the bankrupt, speaking through Mr. Chief Justice FULLER, said (p. 14):

"The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by simpler methods of the bankrupt law.

"It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction, *Bank v. Sherman*, 101 U. S. 403; and on adjudication, title to the bankrupt's property became vested in the trustee, §§ 70, 21*e*, with actual or constructive posses-

sion, and placed in the custody of the bankruptcy court."

See also *Bryan v. Bernheimer*, 181 U. S. 188.

The rule declared in the Mueller case, *supra*, was applied in the Circuit Court of Appeals of the Eighth Circuit in *In re Granite City Bank*, 137 Fed. 818. It appears from an examination of that case that the District Court of the United States for the Northern District of Iowa sitting in bankruptcy ordered a sale of grain belonging to the bankrupt, which was located on his premises across the State line in South Dakota. A South Dakota bank which had received notice by mail of the application of the Trustee for a sale, and which bank held a mortgage upon the property, appeared specially and objected to the Referee's jurisdiction to sell the property, on the grounds that it was situated beyond the territorial limits of the court and that no service of any kind had been made upon the bank, the mortgagee, within the district. The Court of Appeals upheld the action of the Referee and the District Court. In the opinion, delivered by PHILLIPS, D. J., it is said:

"Upon the selection and qualification of a trustee all the rights, title, and interest of the bankrupt, as of the time of the filing of the petition in bankruptcy, in any property or property rights, by operation of law (section 70, Bankr. Act July 1, 1898, c. 541, 30

Stat. 565; U. S. Comp. St. 1901, p. 3451), pass to and vest in the trustee, who then became the custodian for the court. The possession of the bankrupt, without more, is transferred to the trustee. No demand for the surrender and possession of the bankrupt's property is necessary. Indeed, he would stand in contempt of court, were he to assert the right to hold and possess the property against the trustee. He could not maintain trespass or replevin respecting any personal property owned by him prior to the adjudication in bankruptcy. No matter where the property of the bankrupt estate may have its situs, if within the United States, it passes to and vests in the trustee. . . .

"It is thus made manifest that the criticism upon the petition of the trustee for an order of sale of the property in question, that it did not specifically aver that the property had been taken into the actual custody of the trustee, is without merit. As the fact appeared that the bankrupt owned the property at the time of the adjudication in bankruptcy, and as possession is presumptively with the owner, it has never been supposed by courts of bankruptcy that such petition should, *ipsissimis verbis*, aver that the trustee has the property in custody. . . .

"Counsel for the bank seem strangely affected with notions about State lines under the bankrupt act. They challenge the right to reach the bank in South Dakota by notice sent out by the referee in Iowa, and the right of the court of bankruptcy in Iowa to draw the bank from its residence in South Dakota to determine its rights as a preferred mortgagee. Under the scheme of the bankrupt act, the District Court of the

domicile of the bankrupt takes exclusive jurisdiction of the bankrupt and his property, wherever situated, to administer it and distribute the proceeds *pari passu* among the creditors according to their respective rights and priorities. Only one court—the court making the adjudication—collects, marshals, administers, determines priorities of the parties, and directs the distribution of the assets." (Pp. 821-2.)

The doctrine enunciated in the foregoing case was followed by the same court in *In re Dempster*, 172 Fed. 353, in which it appears that after bankruptcy proceedings had been instituted in the Southern District of New York a petition was filed in the United States District Court in Missouri by the Receiver and the original petitioning creditors for an order enjoining the sale upon execution by the sheriff of a large portion of the bankrupt's property, consisting of a mine and mining machinery, which was about to be held under a judgment recovered against the corporation in Missouri by Dempster. The motion also asked for the appointment of an ancillary receiver. An order was entered appointing an ancillary receiver and for an injunction restraining Dempster, although the petition had prayed for no subpoena or answer and no notice or service was given Dempster. Thereafter the Missouri court made an order directing the ancillary receiver to turn over the property to the Trustee,

who had in the mean time been appointed by the New York court. Reversing the original order, the Court of Appeals said (pp. 355, 356):

"The court in which the petition is filed has plenary jurisdiction in bankruptcy throughout the United States. Within that limit all the estate in the possession of the bankrupt or held by another as his property is brought immediately within the custody of the court and made subject to its protection. The filing of the petition is an attachment of the estate, and an injunction restraining any act which will interfere with its administration in bankruptcy. This jurisdiction is national, and takes no account of districts or States. *In re Wood and Henderson*, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046; *In re Williams*, (D. C.) 123 Fed. 321, approved by the Circuit Court of Appeals of the Second Circuit, in the case of *In re Von Hartz*, 142 Fed. 726, 74 C. C. A. 58. See, also, *In re Williams*, (D. C.) 120 Fed. 38; *In re Schrom* (D. C.) 97 Fed. 760."

. . . . . .

"The authority of the bankruptcy court to appoint a receiver for the preservation of the estate pending the adjudication, to authorize the receiver temporarily to conduct the business of the alleged bankrupt, and to make all orders necessary for the accomplishment of those objects, applies to the entire estate of the bankrupt, wheresoever it may be situated in the United States, and is not confined to such property as may be within the district wherein the petition in bankruptcy is filed. In short, the authority to take precautions for the preservation of the estate pending

the adjudication in bankruptcy is quite as broad, territorially speaking, as is the authority to collect, administer, and settle the estate after a trustee is appointed. Section 2, cl. 3, of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 545, U. S. Comp. St. 1901, p. 3421,) authorizes the court to appoint receivers 'for the preservation of estates, to take charge of the property of bankrupts.' Wherever the estate is in the United States, there this jurisdiction extends. In its exercise the court may authorize the receiver to take possession of property belonging to the estate wherever situated, and restrain third parties from interfering with that possession, and may also restrain them from pursuing remedies in other courts which will conflict with the duties of the receiver. In the recent case of *In re Muncie Pulp Co.*, 151 Fed. 732, 81 C. C. A. 116, the Circuit Court of Appeals of the Second Circuit held that a court of bankruptcy in the Southern District of New York had power to authorize its receiver to take possession of real property belonging to the estate in Arkansas, and to restrain creditors residing in that State from prosecuting actions in its courts by attachment against the property. Upon the authority of that case, the court of New York in the instant case had jurisdiction to restrain the execution sale now under consideration by specific order."

In the case of *In re Wood and Henderson*, 210 U. S. 246, it is recited in the syllabus, that:

"Congress has the right to establish a uniform system of bankruptcy throughout the United States, and having given jurisdiction to a particular court to ad-

minister the property, that court may, in some proper way, call upon all parties interested to appear and assert their rights."

This court likewise, in the case of *U. S. Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, discussing the jurisdiction conveyed upon the bankruptcy court, speaking through Mr. Justice VAN DEVANTER, said (p. 217):

"We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them."

Having demonstrated that the Illinois bankruptcy court acquired full jurisdiction over the land in question as of the date of the filing of the petition, we may now inquire whether such jurisdiction is impaired or limited to the extent that the court could not sell the land except in compliance with the Act of Congress of March 3, 1893. The language of the section of this

Act known as Chap. 225, 27 Stat. 751 (U. S. Comp. St. 1901, p. 710), relied upon by the defendants in error, is as follows:

"That all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the court-house of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises as the court rendering such order or decree of sale may direct."

It will be observed that this Act was passed and approved some five years before the enactment of the Bankruptcy Act. The decisions of this court and of the inferior tribunals from which we have quoted (and others might have been cited) show the full and complete power vested in the Bankruptcy Court by Congress. It is clearly a general act, conferring full and exclusive jurisdiction upon these courts to act within its provisions with regard to matters comprehended in the statutes. This later and wider enactment is manifestly sufficient in and of itself, and by its terms, to confer jurisdiction upon the bankruptcy court to fully administer the estate in accordance with the provisions therein contained, without being hampered or bound by the terms of a former enactment having reference only to ordinary judicial sales.

Section 70*b* of the Bankruptcy Act provides that:

"All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by and report to the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than, subject to the approval of the court, for less than 75 per cent of its appraised value."

The general power conferred upon the Bankruptcy Court by the foregoing act to make sales with practically no other limitation than that they should be subject to the approval of that court, amounts to the conferral of an absolute right of sale, subject only to the limitations therein imposed. This court has recognized this fact in General Orders in Bankruptcy, No. 18, which it will be remembered provides for a sale of any portion of the bankrupt's estate at private sale.

The rule of statutory interpretation which we believe should be applied in the case at bar is laid down by Sutherland in his work on Statutory Construction, Vol. 1, Section 254, as follows:

"A new statute which affirmatively grants a larger jurisdiction or power, or right, repeals any prior statute by which a power, jurisdiction or right less ample or absolute had been granted. If the exercise of a power granted by a legislative act may include going beyond limits fixed by a prior statute, such limitation

is impliedly removed, at least so far as it conflicts with the doing of that which is subsequently authorized."

It was held by HALE, D. J., in the case of *In re Edes*, 135 Fed. 595, affirming an order of sale of real estate by a referee in bankruptcy, wherein it appeared that the trustee had not complied with the provisions of Section 3 of the Act of March 3, 1893, providing for the publication of the notice of the sale for at least four weeks prior to the same in a newspaper regularly issued and of general circulation in the county and State where the real estate proposed to be sold is situated, that the Court of Bankruptcy was not limited in its powers to make sales by that Act. In the written opinion handed down, the learned Judge said (pp. 596–7):

"The evident intention of Congress in passing the bankrupt law in 1898 was to provide an ample and complete method of administering and disposing of the assets of bankrupts. The court created by this law was given jurisdiction which is in the broadest sense equitable. It is the evident intention of Congress to place the details of the administration of the estate within the jurisdiction of the court. Under the general rules of construction, it must be held that, if Congress had intended to limit the sales of property under the bankrupt law to the provisions of the act of 1893, it would have said so in clear terms. The only limitation imposed by the bankruptcy statute is that such

sales must be 'subject to the approval of the court.' (Collier on Bankruptcy, 520, and cases cited.) The bankrupt law is the last expression of the legislative will upon the subject. It clearly does not intend to limit the method of sales of property by the provisions of the act of 1893. If it did, referees and trustees would be very much limited and harassed in their disposition of property—particularly in the disposition of perishable property—and the purpose of the law would be in a large degree defeated. A new statute which affirmatively grants a larger jurisdiction or power or right is held to prevail over any prior statute by which a limited power or jurisdiction or right less ample has been granted. (Sutherland on Statutory Construction, §254, and cases cited.) It must be held that the bankrupt law, in ordering sales, is not limited by the act of March, 1893. . . . . .

"The Federal courts have in fact liberally interpreted the whole statute, as giving full equitable powers to the court. For instance, although section 58, 30 Stat. 561, (U. S. Comp. St. 1901, p. 3444,) provides that creditors shall have notice of all proposed sales of property, still, under the general powers and discretion given by the court in section 70*b*, it is the custom to order sales of perishable personal property even without notice. There can be no question but that a bankruptcy court, under the broad powers given by the bankrupt law, may order a sale of either real or personal property at private sale."

The conclusion reached by Judge HALE in the Edes case, *supra*, met the approval of the court in *In re National Mining Exploration Company*, 193 Fed. 232,

at page 235. Referring to the Act of 1893, *supra*, DODGE, D. J., said:

"If the statute applies here, the decision is binding upon this court. But although the statute purports to govern all sales of real estate by the Federal courts, I agree with the decision in *In re Edes*, (D. C.) 135 Fed. 595, that it does not bind those courts in their administration of the later bankruptcy act of 1898."

An examination of the opinion handed down by the Supreme Court of Kansas (Rec., pp. 29–31) will disclose that none of the authorities cited in support of the conclusion reached are decisions involving the interpretation of the bankruptcy act. Indeed, (with the exception of *Nutt v. Nellans*, decided by the same court and reported in the same volume,) all of the cases cited were determined prior to the passage of that act. It will be observed that it is stated in that opinion that—

"While the adjudication of bankruptcy conveyed this land and all the property of Hagener to the Trus-

We also desire to call the Court's attention to the case of *In re Britannia Mining Company*, reported in 203 Fed. 450, which decision was rendered after the printing of this brief. It will be observed that the Circuit Court of Appeals in reversing the judgment of the District Court expressly applies the rule laid down in *In re Edes*, *ubi supra*, and *In re National Mining Exploration Co.*, *ubi supra*, and refuses to concur in the decision from which this writ of error has been filed.

The case of *Short v. Hepburn*, cited by the Kansas court as supporting the statement there made, is not at all in point. This case merely construes a Texas statute requiring that all real estate be sold in the county in which it is situated, and holds that a sale made by a sheriff in an attachment proceeding of lands lying outside of his county in disregard thereof was void. It is thus apparent that the case does not reach the point claimed to be decided by the Supreme Court, and is manifestly no authority for the conclusion reached by that court.

Of the cases cited in support of the proposition that the sale by the Trustee in Bankruptcy in the case at bar was not simply erroneous, but void, the Supreme Court cites in support of the doctrine, decisions of the State courts wherein the assignee or trustee is claiming, under some State statute or law, land or property in another State without having complied with the statutes of the latter State, in order to transfer the title to him in accordance with the laws of that State.

The case of *Casseday v. Norris*, 49 Tex. 613, involved the question of an ordinary sale under execution upon a judgment rendered by a United States court in Texas. The decision construed the Texas statute heretofore mentioned requiring sales by the sheriff under execution to be made at the court-house of the county

in which the land to be sold is situated. It was held that under the Federal statute providing that proceedings on final process out of Federal courts are governed by the State laws, the sale by the United States Marshal of land at the court-house of a county in which the land did not lie was void to that extent.

The case of *Casseday v. Norris, supra*, was distinguished by a later Texas case, *James v. Koy*, 59 S. W. 295. This latter was an action brought against a subsequent grantee from a vendee who had bought the land at an assignee's sale under the bankruptcy act of 1867. The third objection made to the defendant's title in that case was that the sale had been made at La Grange, Fayette county, while the land was located in Colorado county, in violation of the provisions of the statute applied in the Casseday case requiring sales of lands made by the marshal under execution to be made in the county where the land is situated. In disposing of this objection the Texas court in the later case, speaking through GILL, Justice, said (p. 297):

"In support of his third ground of objection, appellant cites the case of *Casseday v. Norris*, 49 Texas, 613, in which it is held that in this State sales of real estate taken in execution issued out of a Federal court must be made in the county where the land is situated. Such sales must conform to the local statute governing sales of real estate. The doctrine announced in

that decision does not control such sales as the one under consideration. The statute then in force provided that lands taken in execution should be sold in the county where the land was situated. The land in controversy was not taken in execution. At the date of this sale the assignee might have sold the land at private sale in the absence of an order directing otherwise. In a bankruptcy proceeding the jurisdiction of the court attaches to whatever property the bankrupt may own, wherever situated, and without respect to State or county lines. The assignee may sell lands situated in another State than that in which the proceeding is pending. (Bump, Bankr., p. 168.) In the case at bar the bankrupt resided in Lagrange, in Fayette county. The order of court prescribed the character of notice, and designated the place at which the sale should be made. It is not shown that it was not made as ordered, nor that the deed to Joiner does not recite the facts. We are of opinion that the court did not err in adjudging the land to appellees."

It will be observed in connection with the claim of irregularity because of apparent want of appraisement, that the record does not go to the extent that may be claimed by counsel for defendants in error. The certificates in question were treated by the Trustee and Referee as chattels real or personalty belonging to the bankrupt. The record shows that although the bankrupt scheduled the certificates as real estate, the Trustee applied to the court for an order authorizing him to sell "the certificates of purchase of school lands

situated in Rawlins county, State of Kansas." The Referee made an order directing the sale of the "certificates of purchase" and the Trustee reported the sale of said "three certificates of purchase." The Clerk of the District Court of the United States for the Southern District of Illinois merely certified that the transcript covered all the proceedings in relation to the *real estate belonging to the bank*. For the convenience of the court we herewith copy this certificate:

"I, R. C. Brown, Clerk of the District Court of the United States for said Southern District of Illinois, and keeper of the records and seal thereof, do hereby certify the foregoing to be a true copy; . . . and I further certify that all proceedings in relation to *real estate* belonging to said firm or individuals [Hagener Bros. and W. C. Hagener and John H. Hagener] as completely covered by the foregoing certified copies." (R., p. 10.)

In other words, the certificate does not purport upon its face to be a complete transcript of the proceedings in question. Manifestly, these certificates being treated as personal property would be appraised as such in connection with other property of the same character belonging to the bankrupt, and a certificate showing proceedings with reference to real estate would naturally fail to cover their appraisement. The situation presented by this record, therefore, is one for

the application of the well-settled doctrine of presumption in favor of the rightfulness of proceedings as against a collateral attack thereon.

It is submitted further, that if the record be considered as affirmatively showing the absence of any appraisement of the property in question, the order of confirmation made by the referee (R., p. 10) is sufficient to validate the sale under the discretionary power given to the Referee by Section 70*b* of the Bankruptcy Act of 1898. This section provides:

"All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value."

By the foregoing section of the Bankruptcy Act it appears that the appraisement of the property of the bankrupt is an administrative duty imposed upon the Trustee, and that the appraisement must be of the personal property as well as of the real estate belonging to the debtor. It likewise follows from a careful examination of the section that such appraisement is not a condition precedent to the validity of a sale of the property of the bankrupt. A sale may be had

within the statute upon any terms that will be approved by the court, regardless of the appraised value of the property.

Manifestly the subsequent approval of the court in the case at bar evidenced by the order of confirmation is a sufficient compliance with the section of the statutes above quoted.

The record discloses a clerical misdescription in the publication notice so that the land was described in the publication notice as Section 16, Township 1, Range *1*, instead of Section 16, Township 1, Range *34*. It appears, however, that the petition for the order of sale, the ten days' notice of said petition, the order providing for the sale, and the order confirming the sale, all contained proper descriptions of the tracts sold. It must therefore plainly appear to the court that the mere clerical error in the notice of sale did not deprive the bankruptcy court of its power to make the sale. It had jurisdiction over the bankrupt and his property.

In the case of *Fitzwilliams v. Davie*, 43 S. W. (Texas) 841, wherein an application was made in the Probate Court to set aside a sale therein, the application was denied, and it was held:

"The failure of a notice of sale of land belonging to a person *non compos mentis* to properly describe the property was a mere irregularity, and did not deprive the Probate Court of jurisdiction to make the sale."

The proceeding in question herein attacking the validity of the sale is undoubtedly a collateral one. In *Connor v. McCoy*, 65 S. E. 257, 83 S. C. 165, the Supreme Court of South Carolina held that—

"Proceedings to avoid a judicial sale are collateral unless brought in the cause in which the decree of sale was rendered and for the purpose of setting it aside."

Inasmuch as the sale was duly confirmed by the Referee, it is not subject to attack either because of claimed failure to appraise or of misdescription. The order confirming the sale is equivalent to the judgment of the court thereon placing title to the property sold in the purchaser.

The rule as to the effect of confirmation is clearly laid down in 24 Cyc. 36, as follows:

"The order of confirmation gives to the sale the judicial sanction of the court, and when made it relates back to the time of the sale and cures all defects and irregularities except those founded on want of jurisdiction or fraud."

The same conclusion was reached by Rorer in his work on Judicial Sales. The author says:

"The order of confirmation is in the nature of a final order, judgment, or decree, and may be appealed from. If there is jurisdiction, and the law allows no appeal, then it is final to the like extent as other judgments and decisions, from which no appeal is allowed,

are final. It cannot be assailed in a collateral proceeding. It is a judicial decision that the sale is properly made so far as facts appear on the officer's return."

Rorer on Judicial Sales, 2nd ed., § 113.
See also § 109.

This court has held substantially to the same effect in the early case of *Thompson v. Tolmie*, 2 Peters, 157. The rule laid down in that case has been cited and applied in numerous decisions which are collated in Vol. 2, Rose's Notes, page 819, *et seq.*

In the case of *Trowbridge v. Cunningham*, 63 Kan. 847, a former judgment creditor to one of the heirs of real estate had obtained title to her undivided portion by a sale upon execution, and thereupon instituted a partition suit. It was held by the Supreme Court of Kansas that—

"Objections to methods of appraisement and other steps preliminary to a judicial sale may not be made in a collateral proceeding."

See also:

Butler's Adm'r v. Rodgers, 54 S. W. (Ky.) 848.
Emery v. Vroman, 19 Wis. 724.
Payne v. Spratley, 5 Kan. 525.

It follows from the foregoing that the claimed want of appraisement and the apparent misdescription in the notice of sale cannot avail the defendants in error in this action.

The facts in this case show that the plaintiffs in error have a just and equitable right to the land as against the bare occupancy on the part of the defendants in error. Messrs. Robertson and Ratcliff acquired for a consideration the title of the Trustee in Bankruptcy from the purchaser at the Trustee's sale. They likewise procured for a consideration the interest of the bankrupt Hagener to this land. They have paid to the County Treasurer the balance due upon the original school-land certificates of purchase, including any sums due to the defendants in error, and hold the patent to the land issued to them by the Governor of the State of Kansas. It is submitted that the Supreme Court of Kansas erred in holding and deciding that the plaintiffs in error acquired no right or interest to the land in controversy under the sale made by the Court of Bankruptcy for the Southern District of Illinois. For the reasons stated, the judgment of the Kansas Supreme Court, based upon an opinion unsupported either on principle or authority, should be reversed, with instructions to enter judgment for these plaintiffs in error.

All of which is respectfully submitted.

CHAS. BLOOD SMITH,
SAMUEL BARNUM,
Attorneys for Plaintiffs in Error.

In the Supreme Court
of the United States.

FRED ROBERTSON and W. J. RATCLIFF, *Plaintiffs in Error,* vs. C. F. HOWARD and FRED HOWARD, *Defendants in Error.*	No. 22727.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of Case.

In addition to the statement made by plaintiffs in error, we call attention to the following facts:

The actions involve the title to two quarter sections of land in Rawlins County, Kansas, described as the Southwest Quarter and the Southeast Quarter of Section Sixteen (16), Township one (1), Range Thirty-four (34), known as school lands. These lands were sold, pursuant to law, December 23, 1884. A certificate

or contract of purchase was issued to the purchaser by the county treasurer of Rawlins County, stating that the purchaser had paid down one-tenth of the purchase money and would be entitled to a deed upon the payment of the balance. These certificates, together with the interest of the purchaser in the lands, were, by assignment, transferred to one John H. Hagener, and he became owner thereof in October, 1901. (Record 5-6.)

For non-payment of taxes, the lands were sold by the county treasurer, September 3, 1901, bid in by him for the county, and, thereafter, the tax sale certificates were assigned and transferred to the defendants in error, who paid up the delinquent taxes and interest and took possession of the lands. (Record 19.) In December, 1903, the defendants in error obtained from the county clerk, as authorized by law, renewal certificates of purchase of such school lands, reciting the payments that had been made thereon and that they would, upon payment of the balance due the state within twenty years, be entitled to patents therefor. (Record 17.) Because of irregularities in the proceedings, this tax sale was held to be voidable.

The plaintiffs in error claim title under and by virtue of certain proceedings had in the District Court of the United States for the Southern District of Illinois,

by which, they say, the Hagener interest in these lands was transferred to them.

In November, 1902, John H. Hagener was adjudged a bankrupt by the District Court of the United States for the Southern District of Illinois, and a trustee of his estate was duly appointed and qualified. These two quarter sections of land were listed in his schedules of property as real estate owned by him. (Record 6.)

In May, 1904, the trustee applied to the court for an order to sell certain property of the bankrupt, including the certificates which had been issued in December, 1884, evidencing the sale of these lands and their subsequent assignment to the bankrupt. The referee in bankruptcy, on September 24, 1904, made an order authorizing the sale of two lots in the city of Beardstown, Illinois, and these certificates of purchase of the lands in question, directing the sale to be made "in the city of Beardstown, Illinois, after first advertising said sale in at least one (1) newspaper of general circulation published in Cass County, Illinois, once each week for three successive weeks, and by handbills generally distributed in said county of Cass and state of Illinois not less than ten (10) days prior to said sale, and advertisements containing a brief de-

scription of the property to be sold, time, place and manner of sale."

The trustee published notice that he would, on the 12th day of November, 1904, sell in the city of Beardstown, Illinois, the lots mentioned, "also certificates of purchase of the southwest quarter . . . and the southeast quarter of section sixteen, township one, *range one*, in Rawlins County, State of Kansas." (Record 7.)

November 18, 1904, the trustee made a report of the sale, stating: "I have first offered said certificates; for which I did not receive any bid; I then offered Lot three; and not receiving any bid for said lot, I then offered lots three and four, and said certificates of purchase; and Henry Fraumann bid one hundred and fifteen dollars, for said lots three and four and said certificates of purchase; and the said Henry Fraumann being the highest bidder the said real estate was struck off to him." (Record 8.)

On November 29, 1904, the referee made an order confirming the sale of the lots, and finding "that at said sale trustee failed to receive any bid for certificate of purchase of the southwest quarter (¼) . . . and the southeast quarter (¼) of Section Sixteen (16), Township One (1), Range Thirty-one

(31), in Rawlins County, Kansas," made no order concerning such certificates.

April 18, 1906, the trustee made another report of the sale of November 12, 1904, in which he reported the sale of the lots, and certificates of purchase of three quarter sections of school land, including the two quarters in question, to Henry Fraumann for $115.00, "said three certificates of purchase being sold for One ($1.00) Dollar each cash in hand paid as a part of said consideration of One Hundred Fifteen ($115.00) Dollars for said lots and certificates," and that he had assigned and delivered such certificates to Fraumann. (Record 9-10.)

No appraisement was made of these lands (Record 10), and no notice was given that the lands or any interest which Hagener had in them would be sold.

Henry Fraumann, on July 19, 1905, assigned the certificates and any interest which he might have in the real estate to Fred Robertson, one of the plaintiffs in error, who subsequently transferred one-half interest to his co-plaintiff. (Record 11.)

The John H. Hagener bankruptcy proceedings were terminated on November 20, 1907.

The Supreme Court of Kansas held that the attempted sale by the trustee in bankruptcy in Illinois of the certificates of purchase of these lands did not vest

title in Fraumann, and, hence, that plaintiffs in error had no title on which they could base a claim of superior right to the possession of these lands as against the defendants.

Argument.

The inquiry in this case involves several different questions.

1. Did the District Court of the United States for the Southern District of Illinois, sitting as a court of bankruptcy, have such jurisdiction over the Kansas lands as authorized it to make sale thereof within that district?

2. If the court had jurisdiction to sell the lands within that district, was such sale effected by merely selling the certificates which were only evidence of the interest which the bankrupt had?

3. Could a valid sale be made without appraisement?

4. Can a valid sale of real estate be made pursuant to a notice which describes an entirely different tract of land?

I.

The interest which Hagener had in the Kansas lands was real estate.

In Kansas that class of property known as chattels real does not exist. There are only two recognized classes of property, real and personal. "The word 'land' and the phrases 'real estate' and 'real property'

include lands, tenements and hereditaments, and all rights thereto and interest therein, equitable as well as legal." General Statutes of Kansas 1909, Section 9037, Sub-division 8.

In this particular case, following the decision in *Poole v. French*, 71 Kan. 391, the Supreme Court of Kansas held that the interest acquired by the purchaser of school lands is real estate.

This determination as to the character of the interest which Hagener had in these lands is conclusive in this Court.

Brine v. Insurance Co., 96 U. S. 627;
DeVaughn v. Hutchinson, 165 U. S. 566.

It follows, therefore, that the bankrupt's interest in these lands was real estate and had to be dealt with as such.

II.

Did the District Court of the United States for the Southern District of Illinois, sitting as a court of bankruptcy, have such jurisdiction over the Kansas lands as authorized it to make sale thereof within that district?

For the purposes of this case it may be conceded that under the bankruptcy act, upon Hagener being adjudged a bankrupt, the title to all his property, including his interest in any real estate, wherever situated, vested in the trustee. The question remains, Did

the bankruptcy act so enlarge the jurisdiction of the District Court of the United States, sitting as a court of bankruptcy, that it could reach out, subject to its orders and dispose of lands situated in other states by proceedings had exclusively within said district? On the part of plaintiffs in error, it is contended that there are no such things as state lines in bankruptcy proceedings; that a district court, sitting as a court of bankruptcy in one district, may proceed to adjudicate and dispose of property of a bankrupt situated in another district the same as if the property was within the territorial boundaries of the district of the court which assumes such jurisdiction. Does such unlimited jurisdiction exist?

As appears by cases cited in the brief for plaintiffs in error, this broad view has been taken by some of the district judges and in some of the courts of appeal. Those cases do not recognize the right to institute ancillary proceedings in the district court of one district to aid bankruptcy proceedings in the district court of another district. We submit, however, that in these cases sufficient importance has not been given to the fact that we are treating of the jurisdiction of a court having limited powers to which is committed the consideration and determination of bankruptcy cases. The exercise of the powers of the

district court of the United States has always been limited by certain territorial boundaries. When the rights of parties litigant required the doing of something in another district, in furtherance of the proceedings in the court of original jurisdiction, it was accomplished by ancillary proceedings in the court of such other district, and not otherwise. The bankruptcy act contains no express provision enlarging this jurisdiction; there still exist the territorial limitations. Section 2 of that act provides: "The District Courts of the United States in the several states, . . . are hereby made courts of bankruptcy, and are hereby invested, *within their respective territorial limits* as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, reside, or had their domicile within their respective territorial jurisdictions for the preceding six months," etc. Section 10 of that act recognizes district lines, and provides: "Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another."

The same limitation is recognized in section 34, which provides: "Courts of bankruptcy shall, *within*

the territorial limits of which they respectively have jurisdiction," appoint referees, etc.

Referees in bankruptcy may exercise many of the powers vested in courts of bankruptcy; but these referees, as expressly provided by section 38 of the bankruptcy act, are only invested with such powers "*within the limits of their districts* as established from time to time."

The provisions of the bankruptcy law above referred to clearly indicate the purpose and intention of congress to make no change in the territorial limitations of the jurisdiction of district courts. Within their districts, these courts have plenary powers in bankruptcy cases; but, so far as real estate having a situs in another district and state is concerned, they have no more power than did the district court have over real estate in another district through a receiver whom it may have appointed to take charge of the property of an insolvent debtor.

The case of In re Granite City Bank, 137 Fed. 818, upon which so must stress is laid by counsel for plaintiffs in error, holds contrary to this contention, but we think it is based upon an entirely erroneous interpretation of the bankruptcy law, and practically has been overruled by this court in *Babbitt v. Dutcher*, 216 U. S. 102. This later decision has also overthrown

other decisions of inferior federal courts which are in line with the Granite City Bank case. The decision, sustaining the ancillary proceedings in *Babbitt v. Dutcher*, could not have been made if the district court in one of the districts of Missouri had jurisdiction over matters which were involved in the ancillary proceedings in the southern district of New York. If the Missouri District Court had full jurisdiction over matters involved in the bankruptcy proceedings without regard to their situs, there was no room for the exercise of jurisdiction by another district court concerning the same matters.

This view of the jurisdiction of the district court sitting in bankruptcy was taken by the Circuit Court of Appeals of the Ninth Circuit in *Staunton v. Wooden*, 179 Fed. 61. In that case, the court held that the District Court of the United States for the Northern District of California had no authority to make an order upon a person in the State of Nevada to deliver to the trustee in bankruptcy in California property which such person had in his possession. In the opinion, the court referred to the case of *Babbitt v. Dutcher*, as sustaining that position. To the same effect is the decision of the District Court for the Eastern District of Wisconsin in In re Benedict, 140 Fed. 55, and the decision of the District Court for the

Western District of Michigan, in *Kirkpatrick v. Gallup*, 200 Fed. 108.

These cases expressly repudiate the doctrine announced by Judge Phillips in the Granite City Bank case.

In principle, the same limitations of jurisdiction apply to the Federal courts, in their respective districts, as apply to the courts of a state attempting to exercise jurisdiction over property in another state.

"It is a well settled principle of law, that the law of *situs* governs exclusively in regard to all rights, interests and titles, in and to immovable property. . . . No court, state or Federal, can reach or confer title, or sell, under decree, lands situate in a state in which it does not sit. Every attempt of a court to found jurisdiction over such lands must, from the very nature of the case, be utterly nugatory." *Williams v. Nichol*, 47 Ark. 254, 262.

See also:

Tompkins v. Adams, 42 Kan. 38.

Watson v. Holden, 58 Kan. 657.

Bullock v. Bullock, 52 N. J. Eq. 561, 46 Am. St. 528.

Short v. Hepburn, 21 C. C. A. 252, 75 Fed. 113.

Casseday v. Norris, 49 Tex. 613.

In *Bullock v. Bullock*, it is said:

"It is scarcely necessary to observe that a court of New York could not have been empowered to affect

by its decree or judgment lands lying within another state. For no principle is more fundamental or thoroughly settled than that the local sovereignty, by itself or its judicial agencies, can alone adjudicate upon and determine the status of lands and immovable property within its borders, including their title and its incidents and the mode in which they may be charged or conveyed. Neither the laws of another sovereignty nor the judicial process, decrees, and judgments of its courts can in the least degree affect such lands and immovable property."

"If the court decreeing a judicial sale was without power to entertain the proceedings, the proceedings are a nullity; no rights can be based upon them, and they are subject to collateral attack in any other proceeding." 24 Cyc. 72.

Again, the Act of Congress of March 3, 1893, (1 U. S. Compiled Statutes, page 170), expressly requires that sales of real estate, under an order of a United States court, must be made in the county where the property is located. The act reads:

"That all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the court house of the county or parish or city in which the property, or the greater part thereof, is located, or upon the premises as the court rendering such order or decree of sale may direct."

It is contended that that act has no application to sales of land in brankruptcy proceedings. It must be admitted that the order of a referee in bankruptcy for the sale of the bankrupt's real estate is an order of

the District Court of the United States. The bankruptcy act is silent as to the place where sales must be made, leaving that matter to the provisions of the general law governing judicial sales. The Act of 1893 is general in its provisions, applicable to all judicial sales, and was undoubtedly enacted for the purpose of avoiding, as far as possible, the sacrifice of property by selling it at a distance from its location. The evils to be prevented are exemplified in this case by the fact that there were no bidders for the bankrupt's interest in three quarter sections of land located in Kansas, when advertised for sale in Illinois, if it can be said such interest was actually advertised, and only by throwing the certificates in with two Beardstown, Illinois, lots did the trustee succeed in disposing of it, and then for the munificent sum of $1.00 per quarter. If the lands, or the bankrupt's interest in them, had been offered for sale in Rawlins County, no doubt a substantial sum would have been bid for them; for the interest which Hagener had was of the value of several thousand dollars.

Repeals by implication are not favored. In the absence of some expression in the bankruptcy law clearly indicating the intention of Congress that this act of March 3, 1893, should have no application to the sale of real estate under an order of the District

Court of the United States, in bankruptcy proceedings, it must be held that the act is applicable to such sales. It is argued that the bankruptcy law confers upon the district courts unlimited discretion as to the manner of disposing of a bankrupt's real estate. No such construction, however, is necessary to give full force and effect to all the provisions of this act. The court may exercise all the powers conferred upon it in perfect harmony and consistency with the act of 1893. The same reasons exist for the application of this rule to sales under the order of a district court in bankruptcy cases as exists in any other case. The reasons existing, it must be presumed to apply, in the absence of a clearly expressed intention that it should not.

III.

If the court had jurisdiction to sell these lands within its district, was such sale effected by merely selling the certificates?

There is a marked distinction between real estate and an instrument which is only evidence of title thereto. A deed or contract may be lost or destroyed without affecting title. The same distinction exists in that case as between the stock of a corporation and the certificates issued by the corporation to evidence ownership. As said by the court in *Culp v. Mul-*

vane, 66 Kan. 143, 151: "The stock is something apart from the certificates. These but evidence a fact which otherwise exists. They are but paper representations of an incorporeal right, and, as such, resemble other muniments of title. The right of stock may exist entirely separate and independently of the certificates."

The trustee offered the certificates, or paper evidences of title, for sale in connection with notes and accounts of the bankrupt, and it was these certificates which he sold. He made no advertisement of the bankrupt's interest in the lands and made no offer of anything more substantial than the certificates themselves. It is not surprising, under such circumstances, that the trustee received no bids, and that, in order to get rid of them, he had to throw them in with two Beardstown lots, and report the sale of the certificates at $1.00 each. What would be thought of the action of a United States marshal, who had an order to sell a quarter section of land, if he should advertise and sell a deed instead of the land? Could such sale, by any stretch of liberal construction, be said to be a sale of real estate? That this is what the trustee did is admitted by counsel for plaintiffs in error. (Brief 26-27.)

In classifying and characterizing the land and the certificates, property having its situs in Kansas, is

not the decision of the Supreme Court of that state conclusive? It involves no Federal question. But it does determine that, under Kansas laws, real estate is one thing and the muniment of title an entirely different thing; that title to land cannot be conveyed by a sale of the deed thereto.

IV.

No appraisement was made.

Section 70B of the bankruptcy law provides:

"All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy five per cent of its appraised value."

The record shows (10) that no such appraisement was made. This is such a fatal defect that confirmation by the referee did not cure it. Appraisement in such a case is just as essential as in any other judicial sale where the law requires appraisement.

Being made without appraisement, such sale was void.

Collier v. Stanbrough, 6 How. 14.

Smith v. Cockrell, 6 Wall. 756.

Capital Bank v. Huntoon, 35 Kan. 577.

The case of *Smith v. Cockrell* arose in the Circuit Court of the United States for the District of Kansas, in which a sale of real estate was made without appraisement as required by the laws of that state. The sale was made and a deed executed by the U. S. Marshall. Subsequently, the validity of the sale and deed was called in question in an action of ejectment brought to recover the possession of the property. The court held that the attempted sale was void and vested no title in the purchaser, for the reason that the appraisement law was ignored. The decision in that case would seem to be controlling as to the validity of the sale in the case at bar.

V.

Legal notice of sale was not given.

The order directing the sale required the trustee to first advertise the same. So far as the certificates were related to any property, it was real estate situated in Section 16, Township 1, *Range 34*, Rawlins County, Kansas. The notice of sale which the trustee published described the certificates as being for land in Section 16, Township 1, *Range 1*, in Rawlins County, Kansas. Range 1 was two hundred miles east of this land. There was nothing in the notice indicating the true description. The notice may as well not have been published at all.

A valid sale cannot be based on such a notice.

Hobart v. Upton, 2 Sawy. (U. S.) 302.

Hughes v. Watt, 26 Ark. 228.

Thomas v. LaBarron, 8 Met. (Mass.) 355.

Den v. Philhower, 24 N. J. Law, 796.

We respectfully submit that, on the various grounds above considered, the pretended sale by the trustee in bankruptcy vested no title to these lands in Fraumann, and, consequently, no title was transferred to the plaintiffs in error. The judgment and decision of the Supreme Court of Kansas should be affirmed.

Respectfully submitted.

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